

No. 12202

United States
Court of Appeals
for the Ninth Circuit

THOMAS J. HUGHES,

Appellant,

VS.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona

APR 24 1949

PAUL P. O'BRIEN,

CLERK

United States
Court of Appeals
for the Ninth Circuit

THOMAS J. HUGHES,

Appellant,

VS.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer	27
Appeal:	
Bond on	39
Certificate of Clerk to Transcript of Record on	245
Designation of Record on (DC)	41
Notice of	39
Order to Send up Original Exhibits on	244
Statement of Points and Designation of Record on (USCA)	248
Stipulation for Diminution of Record on (DC)	242
Bond on Appeal	39
Bond on Removal	23
Certificate of Clerk to Transcript of Record on Appeal	245
Certificate of Clerk to Record on Removal	26
Complaint	2
Exhibit A—Life and Health Insurance Policy	12
Designation of Record on Appeal (DC)	41

ii.

	PAGE
Designation of Record, Statement of Points and (USCA)	248
Judgment, Notice of Entry of.....	35
Minute Orders:	
Feb. 21, 1948—Granting Motion for Removal	26
Oct. 13, 1948—Trial.....	30
Oct. 14, 1948—Further Trial.....	32
Oct. 15, 1948—Granting Motion for Directed Verdict, etc.....	34
Nov. 1, 1948—Motion for New Trial Submitted and taken under Advisement.....	38
Jan. 12, 1949—Denying Motion for New Trial	38
Motion for New Trial.....	36
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	39
Notice of Application for Removal.....	19
Order Denying Motion for New Trial.....	38
Order for Removal.....	25
Order to Send up Original Exhibits.....	244
Petition for Removal.....	20
Statement of Points and Designation of Record on Appeal (USCA).....	248
Stipulation for Diminution of Record on Appeal (DC)	242
Summons	17

	PAGE
Transcript of Testimony and Proceedings.....	42
Exhibits for Plaintiff:	
1—Letter, October 7, 1935, Fred J. Joyce, Manager, Mutual Life Ins. Co., Phoenix, Ariz., to Thomas J. Hughes.....	46
2—Letter, June 28, 1937, Mutual Life Ins. Co. to Thomas J. Hughes.....	49
3—Receipt for X-Ray Film given to Mr. Hughes by Leslie B. Allen.....	60
4—Letter, May 20, 1942, Mutual Life Ins. Co. to Thomas J. Hughes.....	51
5—Letter, June 1, 1942, Laney & Laney to Mu- tual Life Ins. Co.....	55
6—Letter, June 4, 1942, Mutual Life Ins. Co. to Laney & Laney.....	58
7—Letter, June 27, 1942, Thomas J. Hughes to Mutual Life Ins. Co.....	65
Witnesses for Plaintiff:	
Crane, Alex D.	
—direct	209
Evans, H. A.	
—direct	220
Freestone, George L.	
—direct	223
—cross	225

Witnesses for Plaintiff—(Cont'd)

Goss, Dr. H. L.

—direct	67
—cross	79
—redirect	82

Hughes, Thomas J.

—direct	44, 101
—cross	109, 155, 191
—redirect	201

Hughes, Stella C.

—direct	236
---------------	-----

Lynd, Louise

—direct	227
—cross	229

Painter, Roy

—direct	212
—cross	217
—redirect	220

Patterson, Dr. J. H.

—direct	82
—cross	96

Saylor, Charles

—direct	230
—cross	232

Verdict	36
---------------	----

NAMES AND ADDRESSES OF ATTORNEYS

LANEY & LANEY,

Luhrs Tower,
Phoenix, Arizona,

For T. J. Hughes.

EVANS, HULL, KITCHEL, JENCKES & ROSS,

807 Title & Trust Bldg.,
Phoenix, Arizona,

For Mutual Life Insur. Co. of New York.

In the Superior Court of the State of Arizona
in and for the County of Maricopa

No. 59766—Div. 1

THOMAS J. HUGHES,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff in the above-entitled cause, Thomas J. Hughes, by his attorneys, Laney & Laney, and for cause of action against the defendant, The Mutual Life Insurance Company of New York, alleges as follows:

I.

That the plaintiff at all times mentioned herein has been, and now is a resident of the County of Maricopa, State of Arizona.

II.

That at all times mentioned herein the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly admitted, qualified and licensed to do, and doing, the business of life and health insurance in the State of Arizona.

III.

That on or about the 30th day of June, 1923, plaintiff and the defendant entered into that certain contract of life and health insurance, a copy of which is hereto attached, marked Exhibit "A" and by reference made a part hereof.

IV.

That the plaintiff has paid all of the premiums payable under the terms of said contract of insurance as the same became due, up to and until the occurrence of the disability hereinafter alleged, and has also paid under protest, as hereinafter more fully set out, certain other premiums demanded by the defendant.

V.

That said contract of insurance provides, among other things, that if the plaintiff as the insured, after payment of premiums for at least one full year, shall, before attaining the age of sixty years, and provided all past due premiums have been duly paid and the said contract of insurance is in full force and effect, furnish due proof to the company, at its home office, that he has become totally and permanently disabled by bodily injury or disease so that he will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, the defendant, upon receipt and approval of such proof, will grant the following benets;

"Benefits.

"1. Waiver of Premium.—The Company will,

during the continuance of such disability, waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the Company must be paid in accordance with the terms of the Policy, but if due after receipt of said due proof, will, if paid, be refunded upon approval of such proof.

“2. Income to Insured.—The Company will, during the continuance of such disability, pay to the Insured a monthly income at the rate of ten dollars for each one thousand dollars of the face amount of this Policy (but not including dividend additions), the first such monthly payment being due on receipt of said due proof and subsequent payments on the first day of each calendar month thereafter, if the Insured be then living and such disability still continue. No income payments, however, will be made prior to approval of such proof by the Company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due. * * *.” That said contract of insurance further provides as follows:

“Amendment Providing Additional Benefits in the Event of Total and Permanent Disability.

“The clause in this policy entitled ‘Benefits in the Event of Total and Permanent Disability before Age 60’ is hereby amended by the addition of the provisions set forth hereunder and in no other respect:

“1. Increased Income After 5 and 10 Years Continuous Disability.—If the insured become entitled

to the Disability Benefits specified in said clause, the monthly income per \$1000 of the face amount of this policy shall, if the disability be continuous, be increased from \$10, (a) to \$15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to \$20 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. * * *

VI.

That in or about the month of February, 1935, and before the plaintiff had reached the age of sixty years, he became totally and permanently disabled by bodily injury and disease, so that he then was and would continue to be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation. That thereafter, and before the plaintiff had reached the age of sixty years and while said contract of insurance was in full force and effect and at a time after the plaintiff had paid the premiums called for in said contract of insurance for more than one full year, the plaintiff furnished due proof to the defendant Company at its home office that he had become totally and permanently disabled by bodily injury and dis-

ease so that he was and would be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit and from following any gainful occupation.

VII.

That thereafter, and upon the receipt of said due proof, the defendant approved such proof and determined that the plaintiff had become totally and permanently disabled by bodily injury and disease so that he then was and would continue to be permanently, continuously and wholly prevented thereby from performing any work or for compensation, gain or profit and from following any gainful occupation.

VIII.

That the plaintiff now is, and ever since the month of February, 1935, has been, and at all times in the future will be, continuously, totally and permanently disabled by bodily injury and disease from performing any work for compensation, gain or profit and from following any gainful occupation whatever. That the plaintiff has not at any time since he became so disabled in the month of February, 1935, so far recovered as to be able, temporarily or permanently, or at all, to perform any work or enter any occupation whatsoever for compensation, gain or profit.

IX.

That by reason of the plaintiff having become and being so totally and permanently disabled, he became and now is entitled to have the payment of all premiums waived, which, if the plaintiff had

not become so totally and permanently disabled, would be or become due the defendant after the month of June, 1935, and became and is entitled to have paid to him on the first day of each and every month after the month of June, 1935, all monthly income or benefits provided to be paid him by the defendant under the terms of said contract of insurance, up to the present time and at all times in the future.

X.

That after the defendant had so approved the aforesaid proof of the plaintiff's total and permanent disability, it waived all premium payments due after June, 1935, until the premium payment which, but for the plaintiff's aforesaid disability, would have been due under said contract of insurance on June 30, 1942. That shortly prior to June 30, 1942, the defendant, notwithstanding the plaintiff's aforesaid disability, demanded that the plaintiff pay the premium payment which would, but for the plaintiff's aforesaid disability, be due the defendant on June 30, 1942, and thereafter and in each of the years 1943, 1944, 1945, 1946 and 1947, said defendant likewise demanded that the plaintiff pay the premiums falling due on June 30 of each of said years, and in each of the aforesaid years advised plaintiff that if he did not so pay said annual premiums it would cancel his policy of insurance. That the prescribed amount of the annual premium for each of the aforesaid six years was the sum of \$228.02. That the plaintiff, because of the aforesaid

demands of the defendant and threats to cancel out his insurance policy, paid before the due dates thereof each and all of the annual premium payments in the amount of \$228.02 each for the aforesaid years of 1942 to 1947, inclusive; that in so paying said premium payments, the plaintiff paid each and all of the same under protest and demanded the immediate return of each and all thereof to him, upon the ground and for the reason that, because of the plaintiff's aforesaid disability, none of said premium payments were due the defendant, and the defendant was under obligation to waive payment of each and all of the same. That the plaintiff, upon paying each of said annual premium payments, was entitled, under the terms of said contract of insurance, to have and all of the same immediately repaid to him by the defendant. That the total amount of said annual premium payments so made under protest for said six years is the sum of \$1,368.12. That by virtue of the premises, the defendant is indebted to the plaintiff on account of said premium payments in the amount of \$1,368.12, together with interest at the rate of six per cent per annum on each of said annual premium payments from June 30th of the year in which each of the same was paid until said premium payments are repaid to the plaintiff. That the total amount of interest due on said premium payments, up to and including January 31, 1948, is the sum of \$253.08, thereby making a total of \$1621.20 as and for the aforesaid premium payments and interest due thereon from the defendant to the plaintiff, as of January 31, 1948.

XI.

That after the defendant has so approved the aforesaid proof of the plaintiff's total and permanent disability, it started paying the plaintiff the monthly income or benefit payments as provided in said contract of insurance, commencing with the month of July, 1935, and continued to pay such monthly income or benefit payments on the first day of each month thereafter, up to and including the month of January, 1942. That the defendant, from and after the aforesaid January, 1942, payment, has at all times failed and refused to pay any further monthly income or benefit payments, and now refuses to pay any of said monthly income or benefit payments, or any part of the same. That under the terms of said contract of insurance, plaintiff became entitled to have paid to him on February 1, 1942, the sum of \$78.11 as a monthly income or benefit payment, and a like monthly income or benefit payment on the first day of each and every month thereafter until and including the month of June, 1945, and thereafter, under said contract of insurance, became entitled to have paid to him by the defendant the sum of \$104.14 on July 1, 1945, as a monthly income or benefit payment, and a like monthly income or benefit payment on the first day of each and every month thereafter. That the total amount due and owing the plaintiff from the defendant on account of principal of such unpaid monthly income or benefit payments, up to and including January 31, 1948, is the sum of \$6430.85. That the plaintiff is entitled to interest at the rate of

six per cent per annum on each and all of said monthly income or benefit payments from the date each became due until paid. That the total amount of interest on said monthly income or benefit payments due the plaintiff, up to and including January 31, 1948, is the sum of \$1090.92, thereby making a total of \$7521.77 due the plaintiff from the defendant on account of monthly income or benefit payments and interest due him up to and including January 31, 1948.

XII.

That the plaintiff has done and performed all of the terms, conditions and covenants of said contract of insurance on his part to be kept and performed and, although the plaintiff has repeatedly demanded of the defendant that the defendant Insurance Company repay him the aforesaid premium payments paid by him under protest, and pay him the aforesaid income or monthly benefit payments to which he is entitled, said defendant has at all times failed and refused to pay any of said amounts, or any of the interest thereon.

Wherefore, the plaintiff prays the judgment of the court as follows:

1. That the plaintiff have and recover of and from the defendant Insurance Company, as and for principal and interest due him to January 31, 1948, the sum of \$9142.97, together with interest thereon at the rate of six per cent per annum from January 31, 1948, until paid.

2. That the plaintiff have and recover his costs herein incurred, together with such other and further relief as the court shall deem meet and proper in the premises.

LANEY & LANEY.

By GRANT LANEY,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 31, 1948.

WITH (1) TO

TO PERMANENT DISABILITY BENEFITS (MONTHLY INCOME)
DOUBLE INDEMNITY FOR DEATH BY ACCIDENT

have the right and opportunity to ex.

Death of Beneficiary before Insured.

—If any beneficiary die before the Insured, the shall vest in the Insured, unless otherwise provided.

If the interest of a beneficiary shall have vested, if the right to change the beneficiary has been reserved, if there be no existing assignment of this Policy, may, while this Policy is in force, designate a new beneficiary, reserving the right to change the beneficiary, by filing thereof at the Home Office of the Company accompanied by suitable endorsement hereon. Such change shall take effect from the date of filing and shall be subject to the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has — been reserved.

Premiums.—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

and to make an autopsy, unless prohibited by law.

Participation:

Annual Dividends.—This Policy shall participate in the surplus of the Company and the proportion of the surplus accruing hereon shall be ascertained and distributed upon payment of the second year's premium and thereafter at the end of the second and of each subsequent policy-year.

At the option of the Insured each such dividend shall be either —

- (1) Paid in cash; or,
- (2) Used toward the payment of any premium, if the above specified period of grace for such premium payment has not expired and if the remainder of the premium is duly paid; or,
- (3) Applied to the purchase of a paid-up participating addition to this Policy (herein called dividend addition); or,

Left to accumulate to the credit of the Policy with compound interest at the rate of three per centum per annum participating in the interest earnings each year (herein called dividend deposit). Dividends may be drawn on any anniversary of the date of the policy, so drawn, they shall be payable on the surrender, lapse or termination of this Policy.

The Insured shall elect otherwise within three months after the date of any of a written notice requiring the election of one of the above options, the dividends shall be applied to the purchase of paid-up additions per option (3). Such paid-up additions may be for a cash value which shall not be less than the reserve for such surrender. Dividends per option (1), provided the reserve for such paid-up additions has been applied to purchase continued insurance in accordance with the provisions of the clause "Continued Insurance or Lapse".

Options. — "Option of Cash" — At the death of the Insured a cash dividend will be credited to the Insured for the fraction, if any, of the then current policy-year elapsed prior to the death.

TOTAL AND PERMANENT
DISABILITY BENEFITS
(Waiver of Premium and
Income to Insured; Insurance

AMOUNT OF INSURANCE
PAYABLE AT DEATH
PREMIUMS PAYABLE
DURING LIFE

ANNUAL DISTRIBUTION
OF SURPLUS

DOUBLE INDEMNITY
DEATH BY ACCIDENT

have the right and opportunity

Death of Beneficiary before Insured:

—If any beneficiary die before the Insured, the interest shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has — been reserved.

Premiums.—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

autopsy, unless prohibited by law.

Assignment:

—This Policy shall participate in the surplus proportion of the surplus accruing hereon shall payment of the second year's premium of each subsequent policy-year.

At the option of the Insured, the surplus shall be either—

- (1) Paid in full to the Insured;
- (2) Used toward the purchase of a paid-up policy of the same face as the remainder of the premium is duly paid;
- (3) Applied to the purchase of a paid-up policy of the same face as the remainder of the premium is duly paid; or,
- (4) Left to accumulate to the credit of the Policy at the rate of three per centum per annum, plus interest on interest, and dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

Unless the Insured shall elect otherwise within three months after mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

Post-mortem Dividend.—On the death of the Insured a cash dividend will be credited to this Policy for the fraction, if any, of the then current policy-year elapsing before such death.

ORDINARY LIFE INS. AND D. I. GEN.	AMOUNT OF INSURANCE PAYABLE AT DEATH	PREMIUMS PAYABLE DURING LIFE	TOTAL AND PERMANENT DISABILITY BENEFITS (Waiver of Premium and Income to Insured; Insurance)	DOUBLE INDEMNITY FOR DEATH BY ACCIDENT	ANNUAL DISTRIBUTION OF SURPLUS

have the right and opportunity

Death of Beneficiary before Insured:

—If any beneficiary die before the Insured, the interest shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, if the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has -- been reserved.

Premiums.—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

autopsy, unless prohibited by law.

At the

At the death of the Insured, this Policy shall participate in the surplus proportion of the surplus accruing hereon shall be paid to the beneficiary or to the estate of the second year's premium payment of each subsequent policy-year. The surplus shall be either—

- (1) Paid to the beneficiary or to the estate of the Insured, as specified in the Policy;
- (2) Used toward the payment of the premium is duly paid to the beneficiary or to the estate of the Insured, as specified in the Policy (herein called dividend addition); or,
- (3) Applied to the purchase of a paid-up addition to the Policy (herein called dividend addition); or,
- (4) Left to accumulate to the credit of the Policy, the interest at the rate of three per centum per annum, payable at the end of each year (herein called dividend deposit). Dividend deposits may be drawn on any anniversary of the date of the Policy; if not so drawn, they shall be payable on the surrender, lapse or maturity of the Policy.

Unless the Insured shall elect otherwise within three months after mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

Post-mortem Dividend.—On the death of the Insured a cash dividend will be credited to this Policy for the fraction, if any, of the then current policy-year elapsing before such death.

ANNUAL DISTRIBUTION
OF SURPLUS

DOUBLE INDEMNITY FOR
DEATH BY ACCIDENT

TOTAL AND PERMANENT
DISABILITY BENEFITS
(Waiver of Premium and
Income to Insured; Insurance

PREMIUMS PAYABLE
DURING LIFE

AMOUNT OF INSURANCE
PAYABLE AT DEATH

This Policy and the value thereof have been assigned to
 THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
 as sole security for a loan, the amount of which loan and
 of interest thereon payable on redemptions against the
 policy. The Cash Value of the policy,
 New York City **JUN 18 1932** 1. Co.
 THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
 BY *W. L. Simrell* Secretary
 7-501

Annual Dividend Ordinary Life Policy

With Total and Permanent Disability Benefits
 (Monthly Income)
 and

Double Indemnity for Death by Accident

No. 316838

The Mutual Life Insurance

Company of New York.

Insurance on the Life of

Thomas J. Hughes

Amount, \$ 5207.

Date, June 30th 1925

Term of Life.

Annual Premium, \$ 249.94

Amendment Providing Additional Benefits in the Event of Total and Permanent Disability

The clause in this policy entitled "Benefits in the Event of Total and Permanent Disability before Age 60" is hereby amended by the addition of the provisions set forth hereunder and in no other respects:

I. **Increased Income after 5 and 10 Years Continuous Disability.**—If the Insured become entitled to the Disability Benefits specified in said clause, the monthly income per \$1000 of the face amount of this policy shall, if the disability be continuous, be increased from \$10, (a) to \$15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to \$20 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. If the Insured shall so recover and shall subsequently become totally and permanently disabled, the monthly income payments during such subsequent disability shall commence at \$10 per \$1,000 of the face amount of this policy and shall each be of the same amount as if no such prior disability had existed.

II. **Disability Presumed Permanent after 90 Days Continuous Disability.**—If the Insured shall be totally disabled as defined in this policy for a continuous period of not less than ninety days, such disability shall, during its further continuance, be presumed to be permanent, but the Company shall have the right, anything in this policy to the contrary notwithstanding, to require proof of the continuance of such disability, during the first two years of such disability, at any time at which either a premium falls due or an income payment becomes payable, and after said two years, from time to time, but not oftener than once a year, as provided for in said clause in this policy.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

William L. Simrell
 Secretary.

2 JUN 1925

made to THE MORTUARY LIFE INSURANCE COMPANY OF NEW YORK. All the following statements of names and all those day I make in this certificate of death, are true, and are offered to the Company as an inducement to issue the promised policy. I especially warrant that no person who shall have or claim any interest in any policy issued hereunder, all provisions of law pertaining to the same, or who may hereafter claim or demand the same, shall have any knowledge or information which he, she, or they have been or may be in possession of, and which would tend to their prejudice, except in case a confidential receipt shall have been issued in accordance with the provisions of the law.

(Name in full)
 With or without title Mrs. Mary Jane Smith

80. Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? *no*

81. (a) How much weight have you gained in the past year? *none*
 (b) How much weight have you lost in the past year? *none*
 (c) If any change, state cause. *none*

82. How long has weight remained constant? *none*
 (a) When your date of birth? *May 20 - 1875*
 (b) What state or is your age a matter of record, where you were born? *Trinity, N.Y.*

83. (a) Is your vision good? *yes*
 (b) State exact nature of vision of each eye. *yes*
 (c) Do you wear glasses? *no*

84. Do you ever have any suspicion that you or your parents, brothers or sisters ever had any form of epilepsy, paralysis or apoplexy? *no*

85. Has there ever been any suspicion that you or your parents, brothers or sisters ever suffered from tuberculosis or consumption during the past year? *no*

86. Have you ever changed your residence, on account of your health? *no*

87. Do you contemplate making any change in your residence? *no*

88. Has any member of your household suffered from tuberculosis or consumption during the past year? *no*

89. Family record of living

Living	Age of grandparents
Father's father <i>Deceased</i>	
Father's mother <i>Deceased</i>	
Mother's father <i>Deceased</i>	
Mother's mother <i>Deceased</i>	

I certify that the foregoing statements are fully and correctly stated.

Witness and answers were read by me and the deceased.

Witness: *Wm. J. Smith*

State of New York, *1925*
 day of *June*, 1925.

Witness: *Wm. J. Smith*

[Title of Superior Court and Cause.]

SUMMONS

The State of Arizona to the above-named defendant, The Mutual Life Insurance Company of New York, a corporation,

You Are Hereby Summoned and required to appear and defend in the above-entitled action in the above-entitled court, within Twenty Days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within Thirty Days, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The names and addresses of plaintiff's attorneys are Laney & Laney, 610 Luhrs Tower, Phoenix, Arizona.

Given under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Maricopa, this 31st day of January, 1948.

[Seal]

WALTER S. WILSON,
Clerk.

By CLIFFORD H. WARD,
Deputy Clerk.

State of Arizona,
County of Maricopa—ss.

I Hereby Certify that I received the within Summons on the 31st day of January, A.D. 1948, at the hour 12:45 p.m., and personally served the same on the 2nd day of February, A.D. 1948, The Mutual Life Insurance Company of New York, a corporation, being the said defendant named in said Summons, by leaving in the office of the Arizona Corporation Commission, during office hours, County of Maricopa, two copies of said Summons, to which was attached a true copy of the complaint mentioned in said Summons.

Dated this 2nd day of February, A.D. 1948.

Fees, Service, \$1.50; Travel, 2 miles, \$.60; Total, \$2.10.

By L. C. BOIES,
Sheriff.

W. R. YOUNG,
Deputy Sheriff.

[Endorsed]: Filed Feb. 7, 1948.

[Title of Superior Court and Cause.]

NOTICE OF APPLICATION FOR
REMOVAL

To Thomas J. Hughes, plaintiff, and to Laney & Laney, his attorneys:

Please Take Notice that defendant will, on the 21st day of February, 1948, at or about 9:15 o'clock, a.m., file in the above-designated court, and in the office of the clerk thereof, its petition and bond for the removal of the above-entitled and numbered suit to the District Court of the United States, for the District of Arizona, and will, immediately thereafter, or as soon as counsel can be heard, call up said petition and bond for hearing and disposition before said court, in Division No. 1.

Copies of said petition and bond are served upon you herewith.

Dated this 20th day of February, 1948.

EVANS, HULL, KITCHEL,
JENCKES & ROSS.

By /s/ NORMAL S. HULL,
Attorneys for Defendant.

Copy received this 20th day of February, 1948.

LANEY & LANEY.
By GRANT LANEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF SUIT TO THE
DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ARIZONA

To the Honorable The Superior Court of the State of Arizona, in and for the County of Maricopa:

The petition of defendant The Mutual Life Insurance Company of New York, hereinafter called "petitioner," respectfully shows:

I.

This is a suit of civil nature at law, brought by Thomas J. Hughes, as plaintiff, against petitioner, as sole defendant, to recover disability benefits in the aggregate amount of \$9,167.45, under a policy of ordinary life insurance, No. 3168638, including total and permanent disability benefits, issued by petitioner to plaintiff on July 7, 1925.

II.

The amount in controversy, at the time of commencement of this suit exceeded, and now exceeds, the sum of \$3,000.00 exclusive of interest and costs.

III.

Plaintiff was, at the time of commencement of this action, and now is, a citizen and resident of the State of Arizona, and petitioner was, at the com-

mencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of the State of New York.

IV.

The time within which petitioner is required to move, answer, plead or otherwise appear herein has not expired, and petitioner has not moved, answered, pleaded or otherwise appeared herein.

V.

By reason of the matters and things aforesaid, this is a suit of which the district courts of the United States are given original jurisdiction, and is removable to the District Court of the United States, for the District of Arizona.

VI.

Petitioner appears herein specially and solely to remove this suit to the District Court aforesaid on the grounds herein asserted, and petitioner presents herewith a bond, with good and sufficient surety, that petitioner will enter in said District Court within thirty days from the date of filing this petition, a certified copy of the record in this suit and for the payment of all costs which may be awarded by said District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Honorable Court proceed no further herein, except to make an order of removal and to accept said bond, and to

cause the record herein to be removed into the District Court of the United States, for the District of Arizona.

Dated this 20th day of February, 1948.

EVANS, HULL, KITCHEL,
JENCKES & ROSS.

By /s/ NORMAL S. HULL,
Attorneys for Petitioner.

State of Arizona,
County of Maricopa—ss.

Norman S. Hull, being duly sworn, deposes and says that he is one of the attorneys for The Mutual Life Insurance Company of New York, the petitioner in the foregoing petition; that he makes this affidavit for and in behalf of said petitioner, and that he has read said petition, and that the allegations thereof are true.

/s/ NORMAN S. HULL.

Subscribed and sworn to before me this 20th day of February, 1948.

[Seal] DORA DENNEY,
Notary Public.

My commission expires: November 14, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

REMOVAL BOND

Know All Men by These Presents:

That United States Guarantee Company of New York, a corporation duly authorized to engage in a general indemnity and surety business within the State of Arizona, is held and firmly bound unto Thomas J. Hughes, plaintiff in the above-designated and numbered cause, his successors and assigns, in the penal sum of Five Hundred Dollars (\$500) lawful money of the United States of America, for the payment of which well and truly to be made, it binds itself, its representatives, successors and assigns, by these present.

The condition of this obligation is that

Whereas, The Mutual Life Insurance Company of New York, a corporation, the defendant above named, is about to petition the Superior Court of the State of Arizona, in and for the County of Maricopa, for the removal of the above-entitled and numbered cause, therein pending, from said Court of New York, a corporation, the defendant above to the District Court of the United States, for the District of Arizona.

Now, Therefore, if the said Mutual Life Insurance Company of New York, a corporation, defendant, shall enter in said District Court of the United States, for the District of Arizona, within thirty (30) days from the date of filing its petition for removal, a certified copy of the record in said suit, and shall pay all costs that may be awarded by the said District Court of the United States, for

the District of Arizona, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, United States Guarantee Company of New York has caused this removal bond to be executed by its duly authorized attorney-in-fact at Phoenix, Arizona, this 20th day of February, 1948.

UNITED STATES GUARANTY COMPANY OF
NEW YORK.

[Seal] By DEE LATIMER,
Attorney-in-Fact.

State of Arizona,
County of Maricopa—ss:

This instrument was acknowledged before me this 20th day of February, 1948, by Dee Latimer, as attorney-in-fact for United States Guarantee Company of New York, a corporation, who personally appeared before me and stated that he executed the same as such attorney-in-fact, being thereunto duly authorized.

[Seal] GRACE L. PERRY,
Notary Public.

My Commission Expires September 4, 1950.

The above Bond was duly approved by me this 21st day of February, 1948.

M. T. PHELPS,
Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF SUIT TO THE
DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ARI-
ZONA

This cause came on regularly to be heard on the petition of defendant, The Mutual Life Insurance Company of New York, for an order of removal, accompanied by proper bond, and it appearing that this is a proper case for removal, it is

Ordered, Adjudged and Decreed that:

(1) The removal bond be, and the same hereby is approved and accepted;

(2) This cause be, and the same hereby is, removed to the District Court of the United States, for the District of Arizona;

(3) The clerk be, and he hereby is, directed to prepare the record in this cause for removal;

(4) All other proceedings of this Court be, and the same hereby are, stayed.

Done in open Court this 21st day of February, 1948.

M. T. PHELPS,
Judge.

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

Division No. 1

Court convened at 9:30 a.m. Saturday, February 21, 1948. Present: M. T. Phelps, Judge; Walter S. Wilson, Clerk; The Sheriff; the County Attorney; and the Court Reporter.

Comes now Evans, Hull, Kitchel, Jenckes & Ross, appearing as counsel on behalf of the Defendant.

A hearing is had on the Petition for Removal of this case to the United States District Court for the District of Arizona.

It is ordered for removal of the above-entitled case to the District Court of the United States for the District of Arizona and bond is fixed in the sum of \$500.00.

[Title of Superior Court and Cause.]

State of Arizona,
County of Maricopa—ss.

I, Walter S. Wilson, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled cause heretofore pending in the Superior Court of Maricopa County, Arizona, being cause No. 59766 wherein Thomas J. Hughes was Plaintiff and The Mutual Life Insurance Company of New York, a corporation, was Defendant, said record consisting of: Complain, filed January 31, 1948; Summons and Return, filed February 7, 1948; Notice, filed February 21, 1948; Petition, filed Feb-

ruary 21, 1948; Removal Bond, filed February 21, 1948; Order, filed February 21, 1948; and Minute Entry of February 21, 1948, granting Defendant's motion for removal all as appears in the files and or record in my office.

Attest my hand and Seal of said Court at Phoenix, County of Maricopa, State of Arizona, this 10th day of March, 1948.

[Seal] /s/ WALTER S. WILSON,
Clerk of the Superior Court,
Maricopa County, Arizona.

[Endorsed]: Filed March 20, 1948.

In the District Court of the United States
for the District of Arizona

No. Civ. 1153—Phx.

THOMAS J. HUGHES,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Defendant.

AMENDED ANSWER

Defendant answers the complaint, as follows:

I.

Admits the allegations of paragraphs I and II.

II.

Admits that, on or about June 30, 1923, the parties hereto entered into a certain contract or pol-

icy of Ordinary Life insurance, a copy of which is annexed as Exhibit A to the complaint.

III.

Admits that plaintiff has paid premiums and has otherwise complied with the provisions of the policy to the extent that the policy is in force and effect, but denies each and every other allegation contained in paragraphs IV and XII.

IV.

Admits that the policy, subject to provisions, conditions and limitations therein stated, insured plaintiff against permanent and total disability as therein defined, and that some of the language and provisions of the policy are alleged in paragraph V. Alleges that the policy also provides, amongst other things, as follows:

“Proof of Continuance of Disability Required; Recovery From Disability.—Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the Company due proof of the continuance of such disability, and if the Insured shall fail to furnish such proof, or if it shall appear to the Company, except in the case of the ‘Specified Disabilities’ mentioned above, that the Insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further

premium shall be waived and no further income shall be paid."

V.

Denies each and every allegation contained in paragraphs VIII and IX, together with each and every allegation contained in paragraphs VI, VII, X and XI, to the effect that plaintiff became, was, has been, or now is, totally and permanently disabled, as defined in the policy, or entitled to waiver of premiums or to monthly income payments thereunder, and denies the allegations therein contained to the effect that defendant determined that plaintiff was so totally and permanently disabled, but admits that defendant received and retained certain writings purporting to be proofs of disability supplied by plaintiff, as mentioned in paragraphs VI and VII, and that, pursuant to the same, defendant waived payment of premiums from June 30, 1936, until June 30, 1941, and paid monthly income from July 15, 1935, until January 1, 1942, and that defendant discontinued such benefits, and, since such discontinuance, has refused and still refuses to allow the same, as alleged in paragraphs X and XI, and admits that defendant has paid under protest premiums in the total amount of \$1,368.12.

VI.

Denies each and every allegation set forth or contained in the complaint not expressly admitted herein.

Wherefore defendant prays that plaintiff take

nothing by his action, and that defendant recover its taxable cost and such other relief as may be proper.

EVANS, HULL, KITCHEL,
JENCKES & ROSS.

By /s/ NORMAN S. HULL,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 29, 1948.

In the United States District Court
for the District of Arizona

October, 1948, Term

At Phoenix

Minute Entry of Wednesday, October 13, 1948
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Lynn Laney, Esquire, and Grant Laney, Esq., appear as counsel for the plaintiff. Norman S. Hull, Esq., appears as counsel for the defendant. Louis L. Billar is present as Court Reporter.

Both sides announce ready for trial.

A lawful jury of 12 persons is now duly empaneled and sworn to try this case.

It Is Ordered that the remaining jurors be excused to further order.

Counsel for the plaintiff now reads the complaint

to the jury, and counsel for the defendant now reads the amended answer.

Plaintiff's Case:

Thomas J. Hughes is now duly sworn and examined in his own behalf.

The following Plaintiff's exhibits are now admitted in evidence:

Exhibit 1. Letter.

Exhibit 2. Letter.

Exhibit 4. Letter.

Exhibit 5. Copy of Letter.

Exhibit 6. Letter.

Exhibit 3. Letter.

Exhibit 7. Copy of Letter.

And thereupon, at the hour of 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:00 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present, pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

H. L. Goss is now duly sworn and examined on behalf of the plaintiff.

Plaintiff's Exhibit 8, 8 X-rays, is now admitted in evidence.

Plaintiff's Exhibit 9, 13 X-rays, is now admitted in evidence.

Dr. J. H. Patterson is now duly sworn and examined on behalf of the plaintiff.

Plaintiff's Exhibit 10, 4 X-rays, is now admitted in evidence.

Thomas J. Hughes, heretofore sworn, is now recalled and further examined in his own behalf.

Plaintiff's Exhibit 11, 6 checks, is now admitted in evidence.

And thereupon, at the hour of 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to 10:00 o'clock a.m., October 14, 1949, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

In the United States District Court
for the District of Arizona

October, 1948, Term

At Phoenix

Minute Entry of Thursday, October 14, 1948
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

This case comes on for further trial this day. The jury and all members thereof and counsel for respective parties being present pursuant to recess

and further proceedings of the trial are had as follows:

Plaintiff's Case Continued:

Thomas J. Hughes, heretofore sworn, is now recalled and further examined on his own behalf.

And thereupon, at the hour of 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:00 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present, pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

A. W. Crane is now duly sworn and examined on behalf of the plaintiff.

Roy Painter, is now duly sworn and examined on behalf of the plaintiff.

H. J. Evans is now duly sworn and examined on behalf of the plaintiff.

George L. Freestone is now duly sworn and examined on behalf of the plaintiff.

Louise Lind is now duly sworn and examined on behalf of the plaintiff.

Charles Saylor is now duly sworn and examined on behalf of the plaintiff.

Whereupon, the Plaintiff rests.

At 3:10 o'clock p.m. the jury, being first duly admonished by the Court, is excluded from the Court Room.

Counsel for the Defendant now moves for a directed verdict. Said motion is now argued by respective counsel and is submitted.

And thereupon, at the hour of 3:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to 10:00 o'clock a.m., tomorrow, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

In the United States District Court
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Friday, October 15, 1948
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

The jury and all members thereof and counsel for respective parties being present pursuant to recess and further proceedings of the trial are had as follows:

It Is Ordered that the Defendant's Motion for a Directed Verdict be and it is granted. The Jury is now instructed to return a verdict in favor of the

defendant. Herbert F. Leo is now appointed Foreman and now signs and presents the following verdict:

Civil 1153—Phoenix

“THOMAS J. HUGHES,

Plaintiff,

Against

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a corporation,

Defendant.

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant.

HERBERT F. LEO,
Foreman.”

Counsel for the plaintiff now objects to Court's ruling on motion for a Directed Verdict. The Jury is now discharged and excused until further order.

On motion of Norman S. Hull, Esq., It Is Ordered that judgment for the defendant on verdict be entered by Clerk.

On stipulation of counsel, It Is Ordered that plaintiff be allowed to withdraw defendant's Exhibit B for identification, suitcase and present contents.

[Title of District Court and Cause.]

FILINGS—PROCEEDINGS

1948—Oct. 15. Enter judgment for defendant on the verdict (docketed 10/15/48).

[Title of District Court and Cause.]

Civil 1153—Phoenix

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant.

/s/ HERBERT F. LEO,
Foreman.

[Endorsed]: Filed Oct. 15, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL, NOTICE THEREOF AND MEMORANDUM OF POINTS AND AUTHORITIES

The plaintiff, Thomas J. Hughes, respectfully moves the court for an order setting aside the instructed verdict in favor of the defendant and the judgment entered thereon, and granting the plaintiff a new trial, in the above entitled cause, upon the following grounds, to-wit:

1. That the court's order directing a verdict for the defendant, the verdict so directed, and the judgment of the court upon said verdict, were not and are not justified by the evidence, and were and are contrary to law.

2. That the evidence introduced at the trial, taken as a whole, required that the question of the plaintiff's total and permanent disability, within the

meaning of the insurance policy set out as "Exhibit A" to the plaintiff's complaint, should have been submitted to the jury as a question of fact to be determined by the jury.

LYNN M. LANEY,
GRANT LANEY,

By /s/ LYNN M. LANEY,
Attorneys for Plaintiff.

NOTICE OF MOTION

To the defendant in the above entitled cause, and Messrs. Evans, Hull, Kitchel, Jenckes & Ross, its attorneys:

Please take notice that the undersigned will bring the above motion for new trial on for hearing before the court in the courtroom thereof in the Federal Court Building in Phoenix, Arizona, on the 1st day of November, 1948, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

LYNN M. LANEY,
GRANT LANEY,

By /s/ LYNN M. LANEY,
Attorneys for Plaintiff.

* * * *

[Endorsed]: Filed Oct. 22, 1948.

In the United States District Court
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Monday, November 1, 1948
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

Plaintiff's Motion for New Trial comes on regularly for hearing this day. Grant Laney, Esq., appears as counsel for the plaintiff. Norman S. Hull, Esq., appears as counsel for the defendant. Plaintiff's Motion for New Trial is now argued by respective counsel.

It Is Ordered that Motion for New Trial be submitted and taken under advisement.

In the United States District Court
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Wednesday, January 12, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

It Is Ordered that Plaintiff's Motion for New Trial be and it is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Thomas J. Hughes, the plaintiff in the above entitled cause, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment rendered and entered in the above entitled court and cause, on the 15th day of October, 1948, and from the order denying plaintiff's motion for a new trial, made and entered in said court and cause on the 12th day of January, 1949.

Dated at Phoenix, Arizona, this 8th day of February, 1949.

LANEY & LANEY,

By /s/ GRANT LANEY,

Attorneys for Thomas J. Hughes, Plaintiff and Appellant.

[Endorsed]: Filed Feb. 8, 1948.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Thomas J. Hughes, the plaintiff above named, as principal, and Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety, are held and firmly bound unto The Mutual Life Insurance Company of New York, a corporation, defendant above named, in the sum of Two

Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to said The Mutual Life Insurance Company of New York, a corporation, for which payment well and truly to be made we bind ourselves, our heirs, representatives, successors and assigns firmly by these presents.

The condition of this obligation is such that:

Whereas, a certain judgment was rendered and entered on the 15th day of October, 1948, in the above entitled court and cause, and

Whereas, the court on January 12, 1949, entered an order denying plaintiff's motion for a new trial, and

Whereas, the judgment and order were in favor of the above named defendant and against the principal on this bond, and

Whereas, the said principal has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and from the order denying plaintiff's motion for a new trial;

Now, Therefore, if the said principal above named, shall prosecute his said appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed, and such costs as the United States Circuit Court of Appeals for the Ninth Circuit may award if the judgment is modified, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, said principal and surety

have executed these presents on this 8th day of February, 1949.

/s/ THOMAS J. HUGHES,
Principal.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY OF HARTFORD, CONN.,
Surety.

(Seal) /s/ JOE C. HALDIMAN,
Attorney-in-Fact.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 8, 1948.

[Title of District Court and Cause.]

DESIGNATION OF RECORD AND PROCEED-
INGS TO BE CONTAINED IN RECORD ON
APPEAL

To Wm. H. Loveless, Clerk of the above entitled
Court, and Evans, Hull, Kitchel, Jenckes & Ross,
Attorneys for Defendant and Appellee:

Comes now Thomas J. Hughes, the Plaintiff and
Appellant in the above entitled cause, by his attor-
neys, and designates the following records and pro-
ceedings in said cause to be contained in the record
on appeal:

The final judgment, as entered by the Clerk, the
reporter's transcript of the evidence, all pleadings,
evidence, depositions, testimony, exhibits, minute
entries, documents, papers, records, orders and pro-

ceedings in this action, including this designation, and all orders, papers and proceedings hereafter entered, filed or had in this action in this court.

There is filed herewith the reporter's transcript of the evidence.

Dated this 17th day of February, 1949.

LANEY & LANEY,
By /s/ GRANT LANEY,
Attorneys for Plaintiff and Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 17, 1949.

In the District Court of the United States
for the District of Arizona

No. Civ. 1153-Phx.

THOMAS J. HUGHES,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly to be heard in the above-entitled court before Hon. Dave W. Ling, Judge, presiding with a jury, commencing at the hour of 10:00 o'clock

a.m., on the 13th day of October, 1948, at Phoenix, Arizona.

The plaintiff was represented by Messrs. Laney & Laney.

The defendant was represented by Messrs. Norman S. Hull and Richard Meason, of Messrs. Evans, Hull, Kitchel, Jenckes & Ross.

The following proceedings were had:

The Clerk: Civil 1153, Phoenix, Thomas J. Hughes versus The Mutual Life Insurance Company of New York, a corporation, for trial.

The Court: Ready? [1*]

Mr. Lynn Laney: Yes, your Honor, the plaintiff is ready.

Mr. Hull: The defendant is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward.

(Whereupon, 18 jurors were called, examined on their voir dire, after which 12 jurors were empaneled and sworn, and the pleadings were read to the jury by counsel for the respective parties.)

(Thereupon a brief recess was taken.)

All parties, as noted by the Clerk's record, being present, the trial resumed as follows:

The Court: You may call your first witness.

Mr. Lynn Laney: Mr. Hughes, will you take the stand?

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

THOMAS J. HUGHES,

the above-named plaintiff, was called as a witness in his own behalf and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lynn Laney:

Q. What is your name, please?

A. Thomas J. Hughes.

Q. And you are the plaintiff in this case?

A. I am. [2]

Q. Now I will ask you whether, on or about the 7th day of July, 1925, you obtained a life insurance policy from the defendant, The Mutual Life Insurance Company of New York?

A. I did.

Q. And is this the original policy that you have furnished us here? A. It is.

Q. Now I will ask you, Mr. Hughes, whether that is the policy, the exact photostatic copy of which is attached to the complaint that you filed in this case? A. Yes, it is.

Q. Now, Mr. Hughes, I will ask you whether in the early thirties you suffered any accident of any sort?

A. Yes, I was kicked with a mule and I think there was a third, fourth and fifth vertebra in the back was fractured.

Q. And that was when, as near as you can fix it, Mr. Hughes, the year?

A. Well, it is in '32, some time in '32.

Q. In 1932? A. Yes, it was.

(Testimony of Thomas J. Hughes.)

Q. Well, how long were you laid up with that?

A. Well, I couldn't say exactly, but it was— [3] well, I think I was confined to my bed for about eight months and then——

Q. Now, I will ask you whether then some time after that you had another accident?

A. Well——

Q. Just say yes or no, and then I will get at——

A. Yes.

Q. About when was that?

A. Well, that was in '35.

Q. And what was the general nature of that accident?

A. Well, I fell on the front steps and injured the back, was broken, the vertebrae in the back, they were broken and I have been laid up ever since.

Q. Now, I will ask you then, whether upon becoming so laid up some time in '35, you made application to the Company for your monthly benefits in accordance with the policy for permanent total disability?

A. Yes, I did.

Q. And waiver of premiums. Did it include that, Mr. Hughes; did you include in it your application for waiver of premiums?

A. I did.

Q. Now, well, during——

Mr. Laney: Will the Court pardon me, we have a [4] number of papers, I am sorry, I don't have the correct papers in my hand—(pauses). Well, I will ask that this be marked for identification, please, Mr. Clerk.

(Testimony of Thomas J. Hughes.)

(Thereupon, the document was marked as Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Laney): Mr. Hughes, I will show you Plaintiff's Exhibit 1 for identification and ask you whether you recognize it and whether you received it through the mail in due course about the date it bears of October 7th, 1935?

A. Yes, I did.

Mr. Laney: And that is from the Company. I will offer that in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 1 in evidence.)

Mr. Laney: With the Court's permission, I will read it briefly.

(Thereupon Plaintiff's Exhibit No. 1 in evidence was read to the jury by Mr. Laney.)

PLAINTIFF'S EXHIBIT No. 1

[The Mutual Life Insurance Company of New York Letterhead.]

Phoenix, Ariz., October 7, 1935.

Mr. Thomas J. Hughes
Route No. 1 Box No. 29
Tempe, Arizona
Policy No. 3,168,638

Dear Sir:

In connection with your claim for disability benefits under the above policy, we are pleased to ad-

(Testimony of Thomas J. Hughes.)

wise that your claim has been approved.

We enclose herewith the Company's check, payable to your order, in the amount of \$208.28, which represents the payment of the benefit of \$52.07 due on July 15, 1935, and a like amount on the first of each month thereafter up to and including October 1, 1935.

We also enclose a card, which is to be filled in by you and returned to our Home Office in the envelope provided for that purpose.

Yours very truly,

/s/ FRED J. JOYCE,
Manager.

REP:th enc-2

Q. (By Mr. Laney): Now, Mr. Hughes, where this letter says: "We also enclose a card, which is to be filled in by you and returned to our Home Office in the envelope provided for that purpose," did you return that card? [5]

A. I did.

Q. Now, I will ask you whether, prior to so allowing your claim, you were examined by the Company's—the doctors designated by and representing the Company? A. I was.

Q. And then I will ask you whether the Company thereafter for some time did pay you the monthly benefits provided in the policy and sent the waivers of insurance—waivers of premium?

(Testimony of Thomas J. Hughes.)

A. They did.

Q. And I will ask you whether, from time to time, they requested and obtained further medical examinations of you? A. Yes, they did.

Q. And I will ask you whether you complied with every request they made for medical examinations or for proof of your condition?

A. I did.

Mr. Laney: Well, just as an example, I will ask this be marked for identification.

(The document was marked as Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Laney): I will show you a letter purporting to be dated June 28th, 1937, that purported waiver of premium. I will ask you whether you [6] recognize that and whether you did receive it through the due course of mail about that date?

A. Yes, I did.

Mr. Laney: And I will offer that in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 2 in evidence.)

Mr. Laney: With the Court's permission, I will read it.

(Thereupon Plaintiff's Exhibit No. 2 in evidence was read to the jury by Mr. Laney.)

(Testimony of Thomas J. Hughes.)

PLAINTIFF'S EXHIBIT No. 2

[The Mutual Life Insurance Company of New York Letterhead.]

Phoenix, Ariz., June 28, 1937.

Mr. Thomas J. Hughes,
Tempe, Arizona.

In re Pol. 3168 638.

Dear Mr. Hughes:

In accordance with the disability clause in your policy, the Company has approved the waiver of premium due June 30th, 1937, and the receipt is enclosed herewith.

Disability payment will be continued.

Very truly yours,

/s/ FRED J. JOYCE,
Manager.

REP

The Mutual Life Insurance Company of New York
Home Office, 34 Nassau Street, New York, N. Y.

WAIVER OF PREMIUM

To Thomas J. Hughes, Insured under Policy No.
3168,638.

Under the provisions of this policy, giving disability benefits under the conditions stated therein, The Mutual Life Insurance Company of New York

(Testimony of Thomas J. Hughes.)

hereby waives payment of the premium on the said policy, falling due as follows:

Amount of Premium, \$228.02.

Due Date of Premium, June 30, 1937.

New York, N. Y., this May 27, 1937.

/s/ Illegible,
Secretary.

Countersigned:

/s/ E. D. WILLIAMS,
Registrar.

Q. (By Mr. Laney): Now, Mr. Hughes, I will ask you whether the Company did send you waivers of the premium each year then for all of those years up to and including the year '41?

A. Yes, they did.

Q. And then I will ask you whether, on each month they did send you the disability benefits up to and including the one falling due in January of '42?

A. Yes, they did.

Q. And they would in each of those years send you a similar form of waiver of premium similar to the waiver of premium attached here to Plaintiff's Exhibit 2?

A. Yes, they did. [7]

Q. Now, Mr. Hughes, I will ask you whether from the time when your disability benefits were first started there in the year '35 until the present time, whether you had gotten better or gotten worse?

A. Well, I have got worse.

Mr. Laney: I will ask that this be marked for identification as one exhibit and then this as another exhibit.

(Testimony of Thomas J. Hughes.)

(Thereupon the documents were marked as Plaintiff's Exhibits 3, 4, 5 and 6 for identification.)

Q. (By Mr. Laney): Then, Mr. Hughes, I will show you a purported letter here which has been marked as Plaintiff's Exhibit 4 for identification, and I will ask you whether you recognize that and whether you did receive that through the mail in due course about the date it bears, or shortly thereafter? A. Yes, I did.

Mr. Laney: I will offer Plaintiff's Exhibit 4 for identification in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 4 in evidence.)

Mr. Laney: I will read this.

(Thereupon Plaintiff's Exhibit 4 in evidence was read to the jury by Mr. Laney.)

PLAINTIFF'S EXHIBIT No. 4

[The Mutual Life Insurance Company of New York Letterhead.]

Mr. Thomas J. Hughes
Route No. 1, Box 49
Tempe, Arizona

May 20, 1942.

RE: Policy 3168 638

We have given careful consideration to the allowance of further disability benefits under your policy. As you will observe from your policy, it provides for the allowance of disability benefits upon

(Testimony of Thomas J. Hughes.)

receipt of due proof that you have become totally and permanently disabled in accordance with the policy provisions.

We regret to advise you that in our opinion, the proofs which have been submitted to this Company on your behalf are not sufficient to show you to be totally and permanently disabled in accordance with the policy provisions; now have we obtained other information which shows you to be totally and permanently disabled. These reasons for not approving further benefits must necessarily be without prejudice to the Company's right to assert other reasons which may exist.

We assure you that it is the Company's earnest desire to fulfill its part of the policy contract and to avoid withholding or denying the payment of any benefits to which you may be justly entitled. We will, of course, be pleased to give every consideration to any additional proof which you wish to submit.

Under the present circumstances, it will be necessary to pay within the days of grace all future premiums as they may become due.

We sincerely regret that the circumstances do not permit us to allow further benefits.

Yours very truly,

/s/ A. H. McKINLEY,
Superintendent.

By /s/ J. MacLEOD.

JMcL:FL

(Testimony of Thomas J. Hughes.)

Mr. Laney: Now, Mr. Hughes, upon your getting that letter of May 20th, 1942, that letter that was just introduced in evidence as Plaintiff's Exhibit 4, I will ask you whether you came in to see an attorney? A. I did.

Q. And which attorney did you see?

A. Mr. Laney—Grant Laney.

Q. Mr. Grant Laney here? A. Yes.

Q. And then I will call your attention to Plaintiff's Exhibit 5 for identification—may I ask with permission of the Court, does counsel have the original letter of June 1st, 1942?

Mr. Hull: I don't believe I have it with me. I have no objection to it being a copy.

Q. (By Mr. Laney): I will show you what purports to be a carbon copy of a letter dated June 1st, 1942, written by Laney and Laney to the Company relative to this matter, I will ask you to look it over and state whether you recognize it and whether you were present when it was dictated and when it was written out?

A. Yes, I was.

Q. And I will ask you to state who actually [9] dropped that into the mail, if anyone, if you know?

A. I put it in the mail.

Q. You put it in the mail? A. Yes.

(Testimony of Thomas J. Hughes.)

Q. And was it in a stamped envelope addressed to this Company? A. It was.

Q. As set forth in this carbon copy of the letter?

A. Yes, it was.

Mr. Laney: I will offer this, Plaintiff's Exhibit 5 for identification, in evidence.

Mr. Hull: Your Honor please, I object on the ground that it is self-serving. It is merely a statement of the attorneys stating its view to the Company.

Mr. Laney: May it please the Court, in view of the fact that they say in their letter of May 20th, 1942, in which they attempt to discontinue these, they say that: "We will, of course, be pleased to give every consideration to any additional proof which you wish to submit." We wish to show that we asked them what they needed and then we did everything that they asked us to do.

The Court: All right, it may be received.

(Thereupon the document was received and marked [10] as Plaintiff's Exhibit 5 in evidence.)

Q. (By Mr. Laney): Now, Mr. Hughes, may I ask—do you recall whether this letter—the original of which was on the form of stationery of my law firm, of Grant Laney's law firm?

A. Yes, it was.

(Thereupon Plaintiff's Exhibit 5 in evidence was read to the jury by Mr. Laney.)

(Testimony of Thomas J. Hughes.)

PLAINTIFF'S EXHIBIT No. 5

June 1, 1942.

Mutual Life Insurance Company of New York
Bureau of Disability Claims
34 Nassau Street
New York, New York

Re: Policy No. 3168 638

Gentlemen:

Mr. Thomas J. Hughes of Tempe, Arizona, has consulted this office relative to your letter dated May 20, 1942, in which you state that it is your opinion that the proofs which have been submitted to your company on behalf of Mr. Hughes are not sufficient to show him to be totally and permanently disabled in accordance with the above-numbered policy provisions, and in which you further state that no further disability benefits will be paid. In this letter you also state that you will be pleased to give every consideration to additional proof of his disability which Mr. Hughes may wish to submit.

We wish to advise you that Mr. Hughes, before he reached the age of sixty years, became totally and permanently disabled within the meaning of the disability benefit provisions contained in his life insurance policy with your company, and that he has been so disabled continuously to the present time, and, in fact, Mr. Hughes is in a much worse condition now than he was in when your

(Testimony of Thomas J. Hughes.)

company first commenced paying him his disability benefits.

Accordingly, since you state that you are willing to consider additional proofs, we are asking you, on behalf of Mr. Hughes, to direct us as to what further proofs should be submitted. Since Mr. Hughes' condition is so much worse now than it was when he first commenced receiving the disability benefits, he is at a loss to understand the statement in your letter to the effects that the proofs heretofore submitted are not sufficient to show him totally and permanently disabled within the provisions of the policy, and is at a loss to understand why you have ceased paying him the disability benefits, and why you are demanding the payment of further premiums upon his policy.

Since Mr. Hughes is now totally and permanently disabled within the provisions of your policy, we, on behalf of Mr. Hughes, now demand that your company pay Mr. Hughes the past due disability benefits which you have failed to pay to him; that you continue to pay them in accordance with the terms of his policy; and that you waive further premium payments.

Mr. Hughes, however, is willing to submit what further proofs your company desires, as he can easily establish beyond any doubt the fact that he is entitled to disability benefits and a waiver of premiums, and thereby avoid litigation.

Mr. Hughes delivered to your Mr. Allen of Tucson, Arizona, and Dr. Woodman of Phoenix two

(Testimony of Thomas J. Hughes.)

different sets of X-rays upon the understanding that they would be returned to him, and we trust that your company will see that these X-rays are so returned to him in due course.

Please advise us as to what further proofs of disability you desire.

Very truly yours,

LANEY & LANEY.

GL:MB

Q. (By Mr. Laney): Now, Mr. Hughes, where there is a recital that you had delivered to the Company's Mr. Allen, of Tucson, Arizona, and Dr. Woodman, two different sets of X-Rays, I will ask you whether you had delivered such to those two gentlemen? A. Yes, I did.

Q. And were the X-Rays of your body, and so on, purporting to show disabilities?

A. Yes, sir; they were.

Q. Now, I will call your attention to Plaintiff's Exhibit 6 for identification, and ask you whether you recognize that as the letter that was shown to you about that date by your attorneys?

A. Yes, I do.

Mr. Laney: I offer Plaintiff's Exhibit 6 for identification in evidence.

Mr. Hull: We object on the same grounds, that it refers to the letter that counsel just read, it is a self-serving declaration and neither document is admissible in evidence.

The Court: It may be received.

(Testimony of Thomas J. Hughes.)

(Thereupon the document was received in evidence as Plaintiff's Exhibit 6.)

(Thereupon Plaintiff's Exhibit 6 in evidence was read to the jury by Mr. Laney.)

PLAINTIFF'S EXHIBIT No. 6

[The Mutual Life Insurance Company of New York Letterhead.]

Laney & Laney

June 4, 1942.

Attornies at Law

Luhrs Tower, Phoenix, Arizona

Thomas J. Hughes, Tempe, Arizona, Policy No.
3168,638

Gentlemen:

Your letter dated June 1, 1942, has been received.

For your information, we wish to advise that it is our intention to have a Company Representative call upon you for a full discussion of the insured's claim with this Company.

Yours very truly,

/s/ A. H. McKINLEY,
Superintendent.

/s/ F. ZUJUBAUER.

FZ:EN

Q. (By Mr. Laney): Now, Mr. Hughes, after the Company had made this statement that they would be glad to receive any other—in substance, they would be glad to receive any other proof of

(Testimony of Thomas J. Hughes.)

disability you wanted to submit, and after your doctors had asked them what they wanted, I will ask whether you did furnish everything that they asked for? A. I did.

Q. And I will ask you whether at any time they ever asked you to submit to their doctor for examination you did that? A. I did.

Q. Or for X-Rays or for anything else.

A. I furnished them whatever they wanted.

Q. Now, calling your attention to Plaintiff's Exhibit 3, I will ask you whether—now, when was it they first cut off paying the disability benefits, [12] the last one they paid?

A. January 1st, 1942, was the last one they paid.

Q. Now, after they cut those off, but before Mr. Grant Laney's letter of June 1st, 1942, I will ask you whether any of their representatives called upon you for further data? A. They did.

Q. I will show you Plaintiff's Exhibit 3 for identification and will ask you to look it over and state whether their representative gave you that about the time of the date it bears?

A. Mr. Allen gave me this letter after I had turned over the X-Rays to him that he wanted.

Q. And was he the Company's representative from Tucson?

A. He was, he represented himself to be the attorney from Tucson.

Q. And I will ask you then whether you did furnish the things that that purports to be a receipt for?

(Testimony of Thomas J. Hughes.)

A. I did, I furnished them X-Rays.

Mr. Laney: I offer in evidence Plaintiff's Exhibit 3 for identification.

Mr. Hull: No objection.

(The document was marked and received as Plaintiff's Exhibit 3 in evidence?)

Mr. Laney: With the Court's permission, ladies and gentlemen, I will read this, in pen and ink, dated March 9th, 1942.

(Thereupon Plaintiff's Exhibit No. 3 in evidence was read to the jury by Mr. Laney.)

PLAINTIFF'S EXHIBIT No. 3

March 9, 1942.

Received from Mr. Thomas J. Hughes one set of x-ray film (4 small & 3 large), taken 6-20-38, and one set of x-ray film (3 large & 1 small), taken 12-9-35.

This film is being borrowed by the Mutual Life Insurance Co. of New York & will be returned to Mr. Hughes.

/s/ LESLIE B. ALLEN.

Q. (By Mr. Laney): Now, I will ask you further whether, when they were discussing the matter of cutting you off, you went to any, at their request, to any other doctors and were examined by any other doctors, just by yes or no?

A. Yes.

(Testimony of Thomas J. Hughes.)

Q. What doctors?

A. One of them was Dr. Woodman here.

Q. Dr. Woodman, of Phoenix, here, a physician and surgeon of Phoenix? A. Yes.

Q. Is that correct, he is a physician and surgeon here? A. Yes, he is.

Q. And who else? A. Dr. Baldwin.

Q. I will ask you whether or not Dr. Baldwin is also known as a physician and surgeon here in Phoenix?

A. Well, I think he is, but I don't know. [14]

Q. I will ask you whether Mr. Allen, the representative of the Company, brought any doctor to you?

A. Yes, he brought a doctor up from Tucson.

Q. What did they do?

A. They examined me there in the room and at my home and——

Q. You live, please, Mr. Hughes, where?

A. Three and one-half miles southeast of Tempe.

Q. And you have a farm there, do you?

A. Yes, I have.

Q. Now, can you remember about the time that it was that Mr. Allen, the Company's representative, brought this doctor from Tucson there to examine you at your home?

A. Well, it was some time later than the time that I come over here to Woodman and Baldwin. It was after that.

Q. That is, calling your attention to the letter of May 20th, 1942, which is in evidence as Plain-

(Testimony of Thomas J. Hughes.)

tiff's Exhibit 4, do I understand you that it was later than that, or do you remember?

A. Well, I think it was, but I am not sure.

Q. At any rate, they did come and examine you there and it was after the time they cut you off?

A. Yes. [15]

Q. I will ask you whether you cooperated and did everything they asked you to in the examination? A. I did.

Q. And what did their doctor, representing you, say to you?

Mr. Hull: Your Honor please, I object to that as hearsay, the doctor not being on the stand.

Mr. Laney: I misstated my question, may I withdraw it?

Q. What was said there, if anything, in the presence of this representative for the defendant Company, Lesley B. Allen, by the doctor that he brought there to examine you on behalf of the Company there at your house, southeast of Tempe, on this occasion in '42 that you have mentioned?

Mr. Hull: The same objection, your Honor.

The Court: He may answer.

Q. (By Mr. Laney): What was said? Go ahead, tell us.

A. He said he didn't see how I could walk without braces on account of the arthritis was bad in the hip.

Q. Now, what did Mr. Allen say to you there at that same time and place and in the presence of these same people? [16]

(Testimony of Thomas J. Hughes.)

Mr. Hull: Your Honor please, the extent of Mr. Allen's authority, who is merely an attorney in Tucson, has not been shown. We object to that as hearsay.

Mr. Laney: Well, I submit he was there and examined him.

The Court: He was there on the Company's business?

Mr. Laney: Yes.

The Court: He may answer.

Q. (By Mr. Laney): Go ahead and tell what Mr. Allen said.

A. He told me they were just going to knock out every insurance policy that was a losing game, that wasn't paying, and that was what his object was.

Mr. Hull: Your Honor please, I move that the answer be stricken, it is prejudicial and not binding on the Company.

The Court: Yes.

Mr. Hull: And the jury instructed to disregard it.

The Court: Disregard it.

Q. (By Mr. Laney): Then, Mr. Hughes, after they had cut you off, then when the next premium payment came due, and which would be due except for your [17] claim of disability, I will ask you whether you consulted with Mr. Grant Laney about what you should do, about whether you should pay the premiums? A. I did.

Q. And thereafter did you—I will ask you

(Testimony of Thomas J. Hughes.)

whether you thereafter paid them under protest?

A. I did.

Mr. Laney: Now I will ask, please, Mr. Clerk, that this be marked for identification.

(Thereupon the document was marked as Plaintiff's Exhibit No. 7 for identification.)

Mr. Laney: I will show you Plaintiff's Exhibit No. 7 for identification and ask you to look that over and state whether or not you recognize that as a carbon copy of a letter that you mailed?

A. Yes, I do.

Q. Who dictated the letter, do you remember whether—where that letter was composed?

A. I think it was Mr. Grant Laney?

Q. Look it over carefully and if you are sure, say so, and if you are not, say so.

A. Yes, that is true, I recognize it.

Q. I will ask you whether you signed that letter?

A. Yes, I did.

Q. I will ask you whether you dropped it in the [18] mail?

A. Yes, I did.

Q. Was it addressed in an envelope, stamped and addressed to whom it was addressed?

A. It was.

Mr. Lamey: I will offer Plaintiff's Exhibit 7 for identification in evidence.

Mr. Hull: Your Honor please, we object on the same ground, it is a self-serving declaration.

Mr. Laney: This is saying that we do it under protest.

(Testimony of Thomas J. Hughes.)

The Court: You are paying the premiums under protest?

Mr. Laney: Yes, that is the purpose of that.

The Court: All right, it may be received.

Mr. Hull: I might state, your Honor please, we admitted all of this.

The Court: I know. It seems a waste of time.

Mr. Laney: Yes, it states it is under protest, but it doesn't say the terms of the protest. The reason they don't admit anything except it was paid under protest.

The Court: Isn't that enough? What else would there be about money and paying it under protest?

Mr. Laney: With the Court's permission may I read this? [19]

The Court: Yes.

(Thereupon Plaintiff's Exhibit No. 7 in evidence was read to the jury by Mr. Laney.)

PLAINTIFF'S EXHIBIT No. 7

Tempe, Arizona, June 27, 1942.

Mutual Life Insurance Company of New York
P. O. Box 1711
Phoenix, Arizona

Gentlemen:

Re: Policy No. 3168,638—

Thomas J. Hughes

I am enclosing herewith two checks drawn by myself in favor of your company on the Tempe National Bank, each being dated June 27, 1942. One

(Testimony of Thomas J. Hughes.)

of these checks is for the sum of \$228.02, and one of them is for the sum of \$30.00. The check in the amount of \$30.00 is for payment of the interest on the loan I procured from you on Policy No. 3168,-638; the check in the amount of \$228.02 is in payment under protest, as hereinafter mentioned, of the premium which but for my permanent total disability would be due June 30, 1942, on the above mentioned policy No. 3168,638.

I am making this payment of premium under protest because of the fact, as shown by proof heretofore submitted to you, that I am and ever since prior to my sixtieth birthday have been totally and permanently disabled within the provisions of said insurance policy, and therefore your company should waive payment of said premium. However, in view of the fact that your company has recently raised some question about my disability, I cannot afford to take the chance of losing my policy by failing to make any payments apparently falling due while this matter is pending and unsettled, although I feel that you will finally determine that I am so disabled.

I shall expect you to return this premium upon such continued disability being established.

Very truly yours,

Enclosures—2

Q. (By Mr. Laney): That, you say, was signed by you? A. Yes, sir.

The Court: We will suspend at this point until

(Testimony of Thomas J. Hughes.)

2:00. Keep in mind the Court's admonition and return at 2:00 o'clock.

(Thereupon a recess was taken at 12:00 o'clock noon.)

2:00 o'Clock P.M.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

Mr. Laney: May it please your Honor, I spoke with opposing counsel, and with the permission—the permission of the Court, we will withdraw the witness for a moment and accommodate the time of the doctor.

The Court: Yes.

Mr. Laney: Will you come forward, Dr. Goss?

DR. H. L. GOSS

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. H. L. Goss.

Q. What is your profession?

A. Physician and surgeon.

Q. And I will ask you whether you have specialized in what we commonly call X-Ray work?

A. Yes, making X-Ray pictures.

Q. Are you duly licensed to practice as a physician and surgeon in Arizona?

A. I am.

(Testimony of Dr. H. L. Goss.)

Q. What college did you get your preparation in?

A. The University of Kansas School of Medicine.

Q. And I will ask you how long you have been specializing in making and interpreting X-Rays.

A. Almost 29 years in Arizona.

Q. Now, I will ask you whether you had occasion to make X-Ray pictures of Thomas J. Hughes— well, first, in the year '38? A. Yes. [21]

Mr. Laney: I will ask that this envelope which I see consists of three large and one small, a total of four purported X-Ray plates, that they be marked for identification.

(Thereupon the X-Rays were marked as Plaintiff's Exhibit 8 for identification.)

Q. (By Mr. Laney): Dr. Goss, I will ask you to examine the contents of Plaintiff's Exhibit 8 for identification and state whether you recognize those— may it please the Court, I will have to correct my statement as to the contents. I find there are more than what I thought they were, and we will correct that a little later. Do you recognize those—(handing documents to the witness)?

A. Yes, these are all films which I had made of Mr. Hughes.

Q. That is, Mr. T. J. Hughes, the plaintiff in this case? A. Yes.

Q. And when did you make them?

A. I have two sets here, some of which we made in '38, and others more recently.

(Testimony of Dr. H. L. Goss.)

Q. Well, are these, though——

A. There is one made here in '48.

Q. Oh, there is one mixed in. Just pick out those that were made in '38, I want to keep them [22] together. We may have had them mixed.

A. All but this one (indicating).

Q. This is '48, is it? A. Yes.

Mr. Laney: May it please the Court, may I correct my statement? When I had this marked for identification, I thought that it was a given number, and you correct me if I am not correct, Doctor. I see, then, in this exhibit that was marked for identification, those of the 1938 taking are 1, 2, 3 large ones, and then 1, 2, medium sized ones, and then two smaller ones, and then one real small one, is that correct? A. Yes.

Q. Now, I will ask you, Dr. Goss, if those several X-Ray plates included in Plaintiff's Exhibit 8 for identification, are true and accurate X-Rays of this particular patient? A. Yes.

Mr. Laney: I will offer them in evidence.

Mr. Hull: No objection.

Mr. Laney: Then the same ones, may it be understood, that I enumerated them at the last?

The Court: Yes, I think we understand that.

Mr. Laney: I think so.

(Thereupon the documents were marked and received as Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Laney): Now, Dr. Goss, from this X-Ray study of this patient, will you tell the jury what you found? A. Yes.

(Testimony of Dr. H. L. Goss.)

Q. Well, did you make a written report at the time of it? A. Yes.

Q. Will you refresh your memory from that?

A. I have that report with me.

Q. Well, go ahead, and as near as you can, tell accurately what you found.

A. Well, we made views of various portions of the—Mr. Hughes' body, among which was the right shoulder, the pelvis, the lumbar vertebrae, the left foot, and the left hand.

Q. Well, now, beginning with the right shoulder, what did you find wrong there, if anything?

A. The right shoulder presents calcification of the subdeltoid bursa with possible attachment to the head of the humerus.

Q. Will you explain what that was, what disease, if any, it manifested?

A. That disease—I have not completed the report on that; may I?

Q. Go ahead. [24]

A. The lower margin of the articulating surface of the right scapula also reveals pronounced arthritic budding.

Q. What is "scapula"?

A. This is a condition which we chemists know as arthritis, osteo arthritis, and its cause, of course, no doctor has yet answered what causes it.

Q. Pardon me, Doctor, just so that we understand it as we go along, what is "scapula," the right scapula?

A. The right scapula is the right shoulder blade.

(Testimony of Dr. H. L. Goss.)

Q. Go ahead and tell what else you found.

A. All right. Now, the pelvis. The bones of the pelvis reveal hypertrophic arthritis, which is especially marked on the outer margin of each acetabulum and inferior borders of the sacroiliac synchondrosis, that means that these arthritic lesions are especially marked on the outer margin of each acetabulum. Now, "acetabulum" is the socket into which the hip bone joint fits, and the sacro-iliac synchondrosis, there is one on each side, that is the joint between the sacrum and the iliac bone.

Q. Go ahead.

A. Now, the lumbar vertebrae in both the [25] anterior posterior and lateral views show massive hypertrophic bone changes especially noted in the bodies——

Q. Now, will you pardon me, lumbar vertebrae, where are they? Will you point on me where they are?

A. Approximately from here to the upper part of your buttocks. There are five of those vertebrae.

Q. Will you explain that further, then, what you found there?

A. I haven't finished reading the report yet——especially noted in the bodies, with ankylosis between the transverse process of the fifth lumbar and the sacrum. That means that the same bone changes are noted in the region of the lumbar vertebrae which I have described in the other portions of the body. Now, the left foot, the dorsal bones show pronounced budding. The left hand: The left hand shows the

(Testimony of Dr. H. L. Goss.)

heretofore mentioned arthritic changes in the carpel bones and in the phalanges. These are the carpel bones and these are the phalanges, the finger bones.

Q. Now, that is the left hand? I am not quite plain about the right shoulder. What did you find there? [26]

A. That is the first one I read on the right shoulder.

Q. Now, you mentioned here that there was ankylosis. Will you explain what "Ankylosis" is?

A. Well, ankylosis is the fixation of one bone to another. The joint is firmly grown across by a new bone tissue which has formed.

Q. Then if I had ankylosis sufficiently in my elbow I couldn't move or bend it, is that it?

A. No.

Q. Now, will you go ahead and explain to the jury how this arthritic condition comes about; what it is; what is deposited there and how it comes about, so they will understand?

A. Well, if the jury understands it they will do more sometimes than I think I can do, because the cause of it is not truly known. It is arthritis—osteoarthritis, and it consists of a thickening of the bone, the addition of calcium salts to the bone so that the bone increases in size in certain areas, and in that way it causes hypertrophic or enlargement. That is about as clearly as I can define it.

Q. Now, Doctor, I will ask you whether, at our request, you brought along a view box that would show this? A. Yes, I did. [27]

(Testimony of Dr. H. L. Goss.)

Q. Will you take some of the X-Rays which are included in Plaintiff's Exhibit 8 and show to the jury where this arthritis, these arthritis deposits are and explain them. Now, that one (handing the document to the witness).

A. This is the pelvis. This is the right side and this is the outer margin of the acetabulum socket for the hip joint. Here it is on the outside. In here are your sacrum bones, here, these joints in the sacrum, and here is your lower lumbar in this particular region, which, in this case, is joined together. These hooks or horns or arthritic buds are shown here.

Q. Now, show some of these deposits—where is this—from the osteo-arthritis, where the deposits are.

A. Well, I have shown them here and here and here (indicating), and you see this roughened place here on the pubic bone, and it shows better in some of the other films. This is practically the same view of the one I just described, but it takes in more of the lumbar vertebrae. You see those horn-like protruberances here?

Q. Those are the arthritic—

A. Those are the arthritic lesions, yes. Now, [28] this is a side view or a lateral view, this being the left side. You will notice the condition here, it has almost grown together here. All of those vertebrae show that same arthritic thickening.

Q. Then as I understand it, here is the pelvic region and this is the backbone up here?

A. That is right. This is the shoulder, the right shoulder joint. This is the bursa which I described

(Testimony of Dr. H. L. Goss.)

before. It shows these calcified deposits in this region here. There is also some roughening up here in the coracoid process of the scapula. That is essentially all there is in that particular film. These are the bones of the left foot. There are arthritic changes up here in the phalanges and the tarsal bones. You notice these little nodules at the extremity of these buds, we call them. Here is rather large calcification on the heel bone, with a spur here. Here are also other arthritic lesions. This is the left hand. That is one view, and this is another view of the same. You will notice these same arthritic buds we see here, what we call the carpal bones, and then we find that in the phalanges or the bones of the fingers. They are quite pronounced here. Also seen here in this wrist joint as I have already described it. I think—this is just a [29] small film but it shows the same condition, however.

Q. These are the osteo-arthritis—

A. Arthritis. This is the sesamoid bone here.

Mr. Laney: All right. Thank you, Doctor. May I just return these?

Q. Now, Dr. Goss, I will ask you whether about April 30th, 1948, you again took X-Rays of Mr. T. J. Hughes and made a study of his condition?

A. What was that date?

Q. Well, in '48, I believe April 30th or thereabouts.

A. No, not—

Q. What date was it?

A. Not April, it was—

Q. September of '48. I am informed that these

(Testimony of Dr. H. L. Goss.)

are in a different envelope from what they originally came. Now, Doctor, I will show you a certain envelope here and ask you if all of these are your X-Ray pictures of Mr. Hughes in the year '48. Then, if they are, I will have them marked for identification. I don't want some in that are not at the same time.

A. Yes, these were all made in '48.

Mr. Laney: Then I will ask, if it please the Court, the envelope containing those I should [30] identify may be marked for identification.

(The documents were marked as Plaintiff's Exhibit 9 for identification.)

Q. (By Mr. Laney): Well, this exhibit, these in Plaintiff's 9 for identification that you have just identified, I will ask you whether they are true and accurate X-Rays of this same patient, T. J. Hughes?

A. Yes.

Q. Made in '48? A. Yes.

Mr. Laney: I will offer them in evidence.

Mr. Hull: We object to these on the ground they have no bearing on this case. The disability period here involved in this litigation ends January 1st, 1948, so it is outside of the scope of the issues in this case.

Mr. Laney: This condition, may it please the Court, is a condition and a continuing condition, and then we will prove that it did continue in the meantime and at all times.

The Court: All right, they may be received.

(Testimony of Dr. H. L. Goss.)

(The documents were marked as Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Laney): Now, Dr. Goss, I am a little confused in my mind as to when you took these [31] pictures that are Plaintiff's Exhibit 9 for identification. A. September 30th, 1948.

Q. And what did you find from those pictures and from your study of them?

A. I found the same condition present which I have described with reference to the films made in '38, which is known as osteo arthritis. In these films the arthritis has increased in extent, which usually takes place as a man grows older.

Q. That is, in the event he has this kind of arthritis—that is, it increases if he has arthritis?

A. Yes, usually, yes.

Q. Well, will you explain to the jury briefly what you found and where the increases were? Now, that picture is that—what is that?

A. This is a picture of the pelvis. It shows the same condition previously described.

Q. And wherein has that increased? Would you explain that and show it and demonstrate that to the jury?

A. Well, this shows—the only way you could tell whether it has increased is to compare it with the other film, but in our opinion there is an increase in this region here, right here, [32] especially. This has almost grown together in these two—two buds, and this lateral view shows exactly the same pathology,

(Testimony of Dr. H. L. Goss.)

with the increase in deposit of calcium between these vertebrae, and in this case it has practically grown together. This is the first lumbar and the last dorsal vertebrae. This is a side view of the dorsal spine. This is a part of the vertebrae just above the lumbar. That extends from the neck down to where the lumbar vertebrae begins. You can see this condition here.

Q. What condition?

A. Condition of arthritis which I have described before. The same condition is present in all of these films. This is the right elbow joint. You see quite massive deposits here. This is the ulna, this is the radius, and the humerus.

Q. What effect would that have on the elbow in your opinion?

A. Well, the extent of it, it would limit motion of the elbow and very likely would cause the patient some pain, although I don't know about that in this particular case. This is the right elbow. This condition here is not quite so marked as it is in the left. There are, however, some arthritic bone changes. [33]

Q. Then as I recall it, the right shoulder is worse—the left elbow is worse than the right elbow?

A. I don't think I have a report on the right shoulder.

Q. Maybe not. Go ahead.

A. This is the right hand. You can see that these fingers out here are quite markedly aseptic. There are more calcified nodules in this than there were in the previous film. This is the left hand. I think we have described that.

(Testimony of Dr. H. L. Goss.)

Q. I thought only the right——

A. Well, this is the left, the left hand. These are the carpal bones here, those are the phalanges or bones of the fingers.

Q. What do you find that is abnormal about that?

A. The same condition. This is the right foot. These are the tarsal bones here with arthritic changes there, here and some in the phalanges of this foot, also here in the heel bone, and between that they call the metatarsal bone. This is the left foot which also shows the same condition of arthritis. Here is this spur down here again, and then the astragalus, the other tarsal bone showing here. These are pictures of the right knee, and this view, this lateral view you find calcification [34] of the patella ligament, and also I see buds on the upper margin and the lower margin of the patella.

Q. The patella is the kneecap?

A. Kneecap, and this is the tibia, which is quite pronounced with arthritic thickening here and also on the tibia. This condition is also seen in the anterior-posterior view. This is the left knee. It is approximately the same as the right.

Q. All right, thank you. Now, Doctor, I will ask you whether in your opinion this arthritic condition that you found in '38 did continue continuously from then until you took them in '48? A. Yes.

Q. Except as you say, it did grow worse?

A. I think it has increased.

Mr. Laney: That is all.

(Testimony of Dr. H. L. Goss.)

Cross-Examination

Mr. Hull:

Q. Dr. Goss, is Thomas Hughes a patient of yours? A. Pardon?

Q. Is Thomas Hughes a patient of yours?

A. No. [35]

Q. Have you ever attended him professionally?

A. No.

Q. Do you engage in the general practice of medicine and surgery, or is your practice limited to X-Rays?

A. No, my practice is limited to X-Ray and laboratory diagnosis alone.

Q. You never made a physical examination of Thomas Hughes, did you? A. Physical?

Q. Yes. A. No.

Q. Nor any other laboratory examination other than those X-Rays, is that correct? A. Yes.

Q. Now, when you referred to this arthritic condition and, particularly when you were describing the pelvic region and the lower extremities, you used the term, as I call it—recall it, hypertrophic arthritis; correct? A. Yes.

Q. And then in one or two instances you also used the term “osteoarthritis,” is that correct?

A. That is right.

Q. Are they synonymous, do they mean the same thing? [36]

A. The term “osteoarthritis” is the general term used for all arthritic lesions, and the hypertrophic arthritis is one in which there is a rather pronounced

(Testimony of Dr. H. L. Goss.)

increase in the calcium deposits in various regions of the body, usually around the joints.

Q. And you are now talking about hypertrophic arthritis? A. That is right.

Q. That is the one, the type which is characterized by pronounced increase in calcification; correct?

A. Yes.

Q. Hypertrophic arthritis is a disease of old age, is it not? A. No, not entirely, no.

Q. Well, isn't it true now, Dr. Goss, that at least 75 per cent of the men past 50 have arthritic changes, hypertrophic arthritis?

A. They have some form of arthritis. Hypertrophic form may not eventuate until later on, but usually men around 50 on up have some form of arthritis.

Q. I presume you know many men beyond 50 years of age who have hypertrophic arthritis, who are gainfully employed in occupations and businesses, [37] isn't that correct? A. Yes, I do.

Q. Now, as a man grows older it is natural for these hypertrophic changes to evidence themselves like they have in this case, isn't that true?

A. It is natural for them to increase in severity, yes.

Q. Now, do you know whether or not these 1948 films that you have testified about were ever submitted to the Mutual Life Insurance Company, the defendant in this case?

A. I have no personal knowledge that they were.

(Testimony of Dr. H. L. Goss.)

They may have been, but I don't know that they were.

Q. What is true, that the '38 pictures, they were sent to the Company, were they not, or do you know?

A. No, I don't know.

Q. Well, let me ask you this, Dr. Goss: Do you know whether or not during the time of the ten-year interval, between '38 and 1948, you or any physician or surgeon that you are associated with took any other X-Rays of the portions of the anatomy of Mr. Hughes that you have testified concerning? [38]

A. I think a set of films were made by the Pathological Laboratory. What doctor, I am not able to state unless it was Dr. J. H. Patterson. I think there was another set made.

Q. But you don't know anything about those?

A. I don't know of my personal knowledge.

Q. In other words, the only pictures you took were in 1938 and 1948, is that right? A. Yes.

Q. Did you personally take both of those sets of pictures?

A. Well, they were all taken under my direction. I took personally the first set and my radiologist took the second set, but it was under my supervision.

Q. Are you associated with Dr. Patterson in the practice of medicine? A. No, I am not.

Q. And, these two sets of X-Rays, one in '38 and the other set ten years later, in the Fall of this year, are the only sets of X-Rays that you took of Mr. Hughes, is that right?

(Testimony of Dr. H. L. Goss.)

A. That is my memory, yes.

Mr. Hull: That is all. [39]

Redirect Examination

Mr. Laney:

Q. Dr. Goss, counsel brought from you that a man past 50 years, at times, had some arthritis. Is it normal or ordinary for them to have any such arthritis as manifested in these pictures?

A. I would not think so to such extent as is shown here.

Mr. Laney: That is all.

Mr. Hull: That is all, Dr. Goss. Thank you.

Mr. Laney: Dr. Patterson.

DR. J. H. PATTERSON

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. J. H. Patterson.

Q. What is your profession?

A. Physician and surgeon.

Q. Are you duly licensed as a physician and surgeon and practicing here in Phoenix, Arizona?

A. Yes, sir.

Q. How long have you been practicing as a [40] physician and surgeon in Arizona?

A. Since '28.

Q. Were you first admitted here in Arizona when you came out of college?

A. Yes, sir.

(Testimony of Dr. J. H. Patterson.)

Q. And what college, if any, are you a graduate of?

A. St. Louis University and Cincinnati.

Q. That is a medical college? A. Yes.

Q. Now, Dr. Patterson, do you know Mr. T. J. Hughes, the plaintiff in this case?

A. Yes, sir.

Q. And has he been a patient of yours?

A. Yes, sir.

Q. Since about when?

A. Oh, I think since about '35.

Q. Now, I will ask you whether you have examined various X-rays of Mr. Hughes that have been made down through the years at various times?

A. Yes, sir.

Q. Now, there is some X-rays here—pardon me—I ask that these be marked for identification.

(The X-rays were marked as Plaintiff's Exhibit 10 for identification.)

Mr. Laney: Q. Showing you Plaintiff's 10 for [41] identification here, purportedly taken by the Pathological Laboratory of the patient, T. J. Hughes, I will ask you whether those were taken pursuant to and under your direction?

A. Yes, they were taken at the instigation of my father and myself, who were practicing at that time.

Q. And I will ask you whether you have—they were taken in the due course of your medical practice in order to inform yourself as to the condition of this patient? A. Yes, sir.

Q. That was back in '35? A. Yes, sir.

Mr. Laney: We will offer those in evidence.

(Testimony of Dr. J. H. Patterson.)

Mr. Hull: I have no objection. I don't see the pertinency of this in '35, but I have no objection.

Mr. Laney: I want to show the condition at that time, and the entire condition. We won't take very much time on it.

The Court: All right, they may be received.

(Thereupon the documents were received as Plaintiff's Exhibit 10 in evidence.)

Mr. Laney: Q. Now, Dr. Patterson, back there in '35, what did you find as to the condition of [42] this patient, T. J. Hughes?

A. You want me to put these on the screen there?

Mr. Laney: Yes, I'd like to have you explain them, please.

(Thereupon the witness placed the X-ray plate in the screen.)

A. You can see beginning arthritis here in both the hip joints with a fuzziness there, and you can see it down along the lower part of those bones here in what we call the pubic and ischial bones. There isn't much change along in these places here. It is beginning to get a little feathering here all around across the hip bone there and you can see a little bit there, you can see a little bit there, a very small amount there, and you can see it beginning to feather out a little bit there and around in there, and also around in the pubic bone there.

Q. And then in just a general way will you show the others?

A. Here is a little bit more, according to this

(Testimony of Dr. J. H. Patterson.)

showing. This is taken from the side of the lumbar vertebrae, the part from the chest down to the hips. You can see this is the normal contour of the bone. You can see here where it is lipping [43] out and here where it has lipped out very prominently, and here, pretty far out there. There is the same condition there and a little bit right there. Now, this is taken anterior and posterior, taken from the front to the back. You can see a little bit of lipping of the same bone I showed to you before. It is not very prominent in this. There is another picture just like the other one taken at a slightly different angle which shows about the same thing.

Q. Now, Dr. Patterson, in the course of your studying of this patient's case, I will ask you if you were treating him, he was your patient and you were endeavoring to help him? A. Yes, sir.

Q. Now I will ask you whether in the course of your endeavoring to help him, you made studies of the X-ray pictures as we laymen would call them, that were taken in '38, the ones that were introduced in evidence as Plaintiff's Exhibit 8 here; did you study those? A. Yes, sir.

Q. Now, Doctor, I will ask you to tell the jury what you know of your own knowledge of this man's condition and how he acted, whether he got better, had progressed, and what about his pain and what [44] about his disability? Go ahead and tell us.

A. Well, I have been taking care of him since '35, and the condition that he is suffering from is chronic multiple hypertrophic arthritis, and the condition has gotten progressively worse, and he has

(Testimony of Dr. J. H. Patterson.)

gotten to the point to where, a number of years ago, he became totally disabled, in my opinion, from working.

Mr. Hull: Your Honor please, I move to have that statement stricken from the record unless he defines what he means by "totally disabled."

The Court: All right, disregard it.

Mr. Laney: What is your Honor's ruling?

The Court: The objection is sustained, of course.

Mr. Laney: All right, now. Dr. Patterson, go ahead and explain what—

A. Well, he has been under my treatment and we have given him all kinds of treatment to try to alleviate this pain and suffering that he has, and as in most of those cases, we are rather helpless, we have not been able to do much for it. He has gotten progressively worse.

Q. Now, Doctor, we will start with his right shoulder and his right arm. Will you describe that to the jury, how that is and how he can use [45] it, or whether he can use it?

A. Well, he can. You can see on the X-rays there has been an increase in the deposits of calcium in nearly all of his joints and, of course, through exercising, even though it is painful, he is able to keep motion in those joints, but he can't use them for very long at a time, because they give him too much pain and it aggravates the condition.

Q. And that is true, is it, of all of those joints?

A. Yes, sir.

Q. And if he should endeavor to take any—do any work that required physical effort or work, what

(Testimony of Dr. J. H. Patterson.)

would you say as to whether it would cause pain and what effect it would have on his health?

A. Well, it makes him feel worse and it makes him have to go to bed at times when he tries to exercise too much or tries to do anything.

Q. And what would you say as to his ability even to sit at a desk and write and hold down a job?

A. Well, due to the arthritis in his shoulder and in his elbow and his hand, it would be very difficult for him to do it. It would be hard for him to try to, because if he tries to use those [46] joints, it makes it just that much worse.

Q. What have you to say as to his ability, we will say, from '35 right on down to the present time, to walk, to walk about on the ranch or farm?

A. Well, in spite of any treatments we have given him, it has gotten progressively worse.

Q. And what have you to say as to what effect on him it would have if he tried to walk about his ranch to any extent?

A. Well, it aggravates the condition that is present.

Q. And what would you say as to whether it is painful or not?

A. Well, of course, as a subjective symptom, but he has every reason to have pain there from the evidence we have on the X-ray.

Q. Now, his condition as shown by the X-rays, is that a normal condition for a man of his age?

A. No, sir.

Q. And then, Doctor, as to the X-rays taken in '38, if you would be good enough to step this way,

(Testimony of Dr. J. H. Patterson.)

now, being in evidence as Plaintiff's Exhibit H, did you make a study of them in the course of your endeavoring to treat this man? A. Yes.

Q. Will you explain briefly to the jury some of [47] these and what effect they would have, in your opinion, on him?

A. Now, you can see—if you remember the side view of the lumbar vertebrae that I showed you in '35, you can see where this is grown to where it is together down to along in here and lipping over there, and accentuating that on this, it is just progressive.

Q. What about the rest of them?

A. Well, they show the same progression. You can see there, as you will remember I pointed out on an earlier film, there is a little feathering and a little more marked there, along in there, along in those areas; much more in there. You can see the anterior lateral view, looking from the front to the back, much more haziness, very cloudy, almost grown together along in there. That shows the same thing, only more clear. That shows it grown completely together, right in there.

Q. That would be, then, a stiff back?

A. Yes, between those joints it is immovable. Now, here it shows an X-ray of his right shoulder. It shows a very marked growth of calcium, deposit of calcium there around his shoulder joint, around the bursa underneath and all along through there. That is a picture of his left hand there. It does [48] not show much arthritis present in that one. It is just a little bit along in there and some along in

(Testimony of Dr. J. H. Patterson.)

there. You can see a small amount in there, some up in this one. It is not very extensive in that one. That one shows about the same thing, a fair amount there. You can see a little there, some growth there, but it is not viewed extensively there.

Q. From your study about the right hand, what did you notice?

A. Well, I haven't got the pictures on that. Now, this shows another view here of the left hand, which shows much more marked on the side view. You can see a lot of it there, a lot of it in these joints here when you take it from the side. It is paramount in that one there. It shows more from the side than it does from the anterior-posterior. There you can see a rather marked amount of arthritis along in here, along in those places there in the joints and some in there, and there is a spur back here, a growth.

Q. That is on his heel?

A. Yes, sir, a good deal here even in the soft tissues there around his ankle joint. You can see here a good deal of it there, the joint along in there. I think we showed this one. [49]

Q. That is the right shoulder?

A. Right shoulder.

Q. Now, Doctor, in the course of your study of this case, have you examined those that were taken more recently in '48?

A. Yes, sir.

Q. Will you just briefly explain them, being Plaintiff's Exhibit 9?

A. There is one of the left hip or left knee, showing growth along in here in the joints, along in there. This shows a better view of the same one taken from

(Testimony of Dr. J. H. Patterson.)

the side. You can see all kinds of arthritis there and a lot of it around the kneecap there. This is even in the soft tissues out here. That shows approximately the same on the right side, arthritis along in the kneecap there. That is anterior-posterior. It does not show—it is about like the other one. It is on the right side. This is the left foot. Now, you can see a good deal of arthritis in there, that joint, around in there; a good deal around there. That one does not show as good as from the side. Now, this is the right side. Right here it shows a good deal more arthritic condition. It shows a lot of arthritis in the ankle joints there and down around those carpal bones in the left hand. It shows a [50] marked increase in the change in the joints here. He has lost a lot of calcium in the bones because of disuse, and if you just don't use those bones of the hand or the body, they lose their calcium content. That is the reason these look so thin, and he has lost so much calcium out of there because of disuse, and here is a lot of arthritis in these joints. There is a great deal of feathering, as you can see. A great amount around the thumb there, on the face of it. A great big amount there from the side. Here is the right one. It shows a good deal of absorption of the bone on the right side here, not quite as bad as the others in the other hand, though. A good deal of arthritis present there. Down in there, that joint and that joint is very marked. This one is very marked. This is the left elbow. This is taken from the side. You can see all kinds of arthritis there. Shows it there. This is the right side, shows very marked arthritis in the joint there, all that feather-

(Testimony of Dr. J. H. Patterson.)

ing there and excess growth here. It don't show as much from the anterior-posterior as it does from the side. This is taken of the chest vertebrae, taken from the side view here, and you can see a lot of feathering there, rather marked arthritis. It has grown together there; [51] it is bridging over in here and it is bridging over in there; beginning to bridge there; got a good deal of deposit back in there and down here there is a fair amount there, and here it has begun down in the lumbar region the same as I showed you in the first few films. You can see how marked it has increased there, gaping across there; practically grown together. Here, it has increased here, grown almost together there, and there. Now, this is taken of the pelvis. You can see the increase in the feathering, a marked deposit around that joint there and also around this joint, also very marked, how it has grown together on that side, along in here and on this side.

Q. Very well, Doctor. Now, if you will resume the stand.

(Thereupon the witness resumed the witness stand.)

Q. Now, Doctor, I will ask you whether in your opinion and from your study of this patient at any time since the year '35, this patient has gotten any better in his condition?

A. The arthritis has gotten progressively worse. There are times when under treatment that we are able to relieve him of his pain, but it was only [52] temporarily while we are treating him.

(Testimony of Dr. J. H. Patterson.)

Q. What do you give him to relieve him of pain, some of the things?

A. Well, we have given him gold shots and arsenic and various other arthritis preparations and also have given him some pills to relieve his pain, simply just as a reliever. It would not affect his arthritis any, just to make him comfortable.

Q. From your study of this patient will you describe further what pain he does endure and give a picture of it to the jury?

Mr. Hull: If your Honor please, I'd like to ask a question on voir dire first.

Q. Dr. Patterson, you can't determine pain except from what the patient tells you, isn't that true?

A. No, sir; we have this steady condition present and we feel when certain conditions are present we feel it will give pain. That is the closest we can come to it.

Mr. Hull: Then I object to the question.

The Court: All right, the objection is sustained.

Mr. Laney: Q. Then what, in your opinion, then, from your study of the case, what have you to [53] say as to the amount of pain that this patient endures?

Mr. Hull: The same objection.

Mr. Laney: No, that is from his study of the case.

The Court: He wouldn't know, he wouldn't know except what the patient told you about the amount of pain he suffered, would you?

A. Your Honor, just like I said, you can't feel their pain for them, you just know there are certain

(Testimony of Dr. J. H. Patterson.)

conditions present, and in our experience it always does cause pain according to what the patient says. That is the closest we can come to it.

Mr. Laney: What would you say of an arthritic patient of this sort if he endeavored to do any work?

A. Well, it would just irritate the conditions present.

Q. And what about pain?

A. Well, if it irritates the conditions present, that brings about more inflammation there and, naturally, would cause more pain.

Q. If a patient of this sort endeavored to carry on farming or any other activity, what would you say as to whether it would be good for his [54] health or not?

Mr. Hull: Your Honor please, I object to that. We are not trying if it would be good for his health or not. That is outside the point.

Mr. Laney: In regard to that, if it please the Court, the patient does not have—

The Court: Your question was “if he did farm work if it would be good for his health.”

Mr. Laney: Well, I will withdraw that question.

Q. Now, if this patient should engage in any physical work, I will ask you whether in your opinion, it would have any bad effect on his health or cause any pain?

Mr. Hull: Your Honor please, I am going to object to that on the same ground.

Mr. Laney: I will submit that is—

The Court: Not as to his health. The Doctor testi-

(Testimony of Dr. J. H. Patterson.)

fied he had an arthritic condition. All he knows about his health is as far as this record is concerned.

Mr. Laney: Well, if an arthritic patient such as this plaintiff does engage in any physical activity, what is the result on him?

A. It is harmful to him.

Q. In what way? [55]

A. It gives him more pain and aggravates all of his joints that he uses. Sometimes it makes him so sore that they have to go to bed.

Q. I will ask you whether in your opinion this patient would be able to walk around the farm or do any work around the farm.

A. He would not be able to walk very far without having a good deal of pain and aggravation of his symptoms.

Q. I will ask you whether that has been true of this patient ever since he had his trouble in '35?

A. Yes, that has always been his complaint to me, when he attempted to work it made his condition worse and he would always have to come in and take treatments for awhile to quiet it down.

Q. Will you explain a little further to the jury what that feathering and those deposits, and so on, what those are as shown in the X-rays and in this patient?

A. It is an excessive deposit of calcium, overgrowth of bone structure there, and when it gets—goes into the joints, of course it makes it very painful for him to try to move it as it is a rough surface, because the joint surfaces are smooth and well lubricated by body fluid. When that rough [56] surface

(Testimony of Dr. J. H. Patterson.)

goes on there, naturally, it is hard for them to use those joints without a great deal of discomfort.

Q. I will ask you whether in your opinion this patient will ever get any better from this condition?

A. No, the usual procedure is they continue to get worse until they are absolutely helpless in bed.

Q. Then you say his condition is progressing?

A. Yes, sir.

Q. Then, Doctor, if we define total disability as such disability that renders a patient permanently unable to perform substantial and material acts of his occupation, or any other occupation in the usual and customary manner, I will ask you whether in your opinion this patient is totally disabled?

Mr. Hull: If your Honor please, there is no foundation laid for that question and I object to that.

Mr. Laney: That is a definition of it, within the rules of the Court.

The Court: All right, you may answer.

A. Yes, I'd say that he is permanently disabled, completely disabled under that definition.

Mr. Laney: Q. Now, what would you say as to his total disability? [57]

Mr. Hull: The same objection, your Honor.

The Court: He may answer.

A. Well—

Mr. Laney: Under that definition, is he totally disabled?

A. He is totally disabled from doing any work that would be harmful to his health. He could walk around, but it gives him pain if he walks around too much. He can't stay at it too long, but yet he is not

(Testimony of Dr. J. H. Patterson.)

completely helpless so far as lifting his hands and arms, feeding himself and clothing himself, but any of it much, and doing any actual work of any kind, he just can't sustain himself on it.

Mr. Laney: You may take the witness.

Cross-Examination

Mr. Hull:

Q. Dr. Patterson, how long have you know Mr. Hughes personally? A. Oh, since about '14.

Q. He was a patient of your Dad's, was he not?

A. Yes.

Q. And you have been very closely related socially to Mr. Hughes for many years?

A. No, sir, I have just known him since I was [58] a boy but I have never been socially acquainted. I have never been to the man's house.

Q. Have you been out to his ranch in the last few years?

A. I have never been to his ranch.

Q. Then when you stated you don't know how much walking he could do around his ranch, you are referring just to a hypothetical situation, you weren't referring to what you observed, that is right?

A. I don't think I answered it that way, Mr. Hull.

Q. Maybe I misunderstood you. What I am trying to get at, Dr. Patterson, is, and if I am incorrect, you correct me, I want to know whether or not what you said with reference to his ability to walk around the ranch is based on personal observation or was just based on your opinion?

A. It is based upon my professional experience

(Testimony of Dr. J. H. Patterson.)

in taking care of a lot of these arthritics over a period of 20 years.

Q. If it should develop in the evidence in this case that Mr. Hughes does walk around his ranch and does drive a tractor and does do other substantial farm duties, then your opinion would not be worth much weight, would it, Doctor? [59]

A. Yes, I think it would be worth just as much as it was. I would say he has got a lot more guts and is a bigger fool than I thought he was.

Q. You would not dispute those facts if he did do those things, would you?

A. Well, you know, there is a difference in a person's susceptibility to pain. Some of them can stand a lot of pain even though it is harmful to them. Others can't stand very much. If he is able to do things like that, I'd say he would.

Q. Dr. Patterson, that is very interesting, but let me ask you if it is not true that in all cases of arthritis of this type that it is included in the medical practice to recommend to patients that they indulge in a lot of physical exercise?

A. Unless it clears his joints up, it is good for him, but when it makes them sore, it is very harmful to them. Mr. Hughes knows that I have tried that. I have kept him limited and I expect that is the reason he is able to get about as well as he is, because we try to keep him going as much as he can without subjecting him, and without creating too much injury to those joints, and too much irritation to them.

Q. You told him to exercise? [60]

A. If he could without harming or hurting him.

(Testimony of Dr. J. H. Patterson.)

Q. How did you determine how much would harm him and how much would hurt him?

A. It may be he would get pain and it may be he would get a little more exercise, and usually I would recommend diathermy there.

Q. Doctor, on how many occasions have you included diathermy treatments for him?

A. Well, according to what my records show.

Q. Would you like to get those records?

A. Might I?

Q. Let me ask you if it is not a fact that during the year 1941, the year prior to the time that this insurance company cut him off, if he only came to your office three times, one in January, one in July, and one in November?

A. Yes, I told him not to come any more than he had to because there is no use running up big bills, because the treatments were not doing him any good, because he comes in when he has so much pain, and he comes in and gets some diathermy treatments.

Q. When you say "he gets so much pain", you are testifying entirely to what he told you?

A. That is absolutely a fact.

Q. Then if he is not telling you the truth and [61] the whole truth, you are absolutely at a loss—

A. No, I believe a man if he has a condition like this, it is always the experience of the doctor in these cases that it causes pain. Doctors who have that condition themselves know they have pain. They have patients they can trust and they know these conditions, when they are present, they cause pain. That is all.

(Testimony of Dr. J. H. Patterson.)

Q. Dr. Patterson, isn't it true that one of the conditions that you pointed out to this jury on the X-ray was an atrophied condition due to the fact that Mr. Hughes has not properly exercised that particular joint?

A. No, I said he was unable to exercise these because they harm him too much, gave him too much pain.

Q. When you say "harm", you mean only pain?

A. Well, when you have pain arising, you have that pain because you have irritation. You get irritation from movement, and that causes irritation.

Q. That is not the question though, Doctor, that I asked you.

A. Well, I am trying to explain it to you; you asked me to explain it to you, that is what you asked for. [62]

Q. All right.

A. That is the loss of calcium in the bones of the hand that I brought out there, that I mentioned on the X-rays.

Q. Dr. Patterson, how many times have you seen this patient professionally this year,

A. Oh, I think about two, three or four times.

Q. How many of those times has he been in in the last two weeks?

A. Well, it has only been one time in the last two weeks.

Q. He was in your office yesterday, wasn't he?

A. Yes, sir.

Q. And the day before?

A. I don't know; I didn't see him; I don't remem-

(Testimony of Dr. J. H. Patterson.)

ber seeing him; he might have been there. I don't know.

Q. What did you prescribe for this patient?

A. You mean over the period of years I have been taking care of him?

Q. Yes.

A. Well, I have given him all kinds of arthritic shots, arsenic shots, gold shots, giving him relief of pain, I have given him diathermy.

Q. And he kept getting worse? A. Yes.

Q. You found him in good physical condition aside from the arthritis?

A. We have been unable to find anything else wrong with him other than arthritis. Of course, that is enough, it is more than I would want.

Mr. Hull: I move that the answer be stricken.

The Court: It may be.

Mr. Hull: You found him organically sound for his age, didn't you? A. Yes.

Q. Found him to be an active man, did you?

A. Yes, sir.

Q. That is, he was mentally alert?

A. Yes, sir.

Q. And you made several physical examinations to determine those things, didn't you?

A. Yes.

Q. Isn't it true, speaking of these arthritic patients that you have been talking about, that walking and exercising is beneficial because it keeps the rough edges off, the spurring of those joints?

A. I think I have answered that question several times.

Mr. Hull: That is all, Doctor.

Mr. Laney: That is all. May this witness be [64] excused?

The Court: Yes. We will have our afternoon recess. Keep in mind the Court's admonition during the recess.

(Thereupon a recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows):

THOMAS J. HUGHES

resumed the witness stand and having been theretofore duly sworn, testified as follows:

Direct Examination (Resumed)

Mr. Laney:

Q. Mr. Hughes, you had identified and was introduced in evidence Plaintiff's Exhibit 7, being a letter of June 27th, 1942, in which you said you made the first payment under protest and why you protested. Now, I will call your attention to six checks and ask you if those are the checks for the annual premium that you paid on the date each check bears for the years that they show, that is, '42 up to and including '47?

A. These are the checks of \$228, premium due each year.

Q. I will ask you whether, when you sent each one in, you did it under protest and referred to the protest and letter, the letter of June 27th, 1942, which is in evidence as Plaintiff's Exhibit 7?

A. Yes, that is right.

(Testimony of Thomas J. Hughes.)

Mr. Laney: I will offer these checks in evidence, may it please the Court.

Mr. Hull: I have no objection.

Mr. Laney: May I put the seven checks just in the envelope together?

The Court: They may be received.

(Thereupon the documents were marked as Plaintiff's Exhibit 11 in evidence.)

Q. (By Mr. Laney), Now, Mr. Hughes, from the time in '35, when the Company as is shown in the evidence, first admitted you were disabled under the policy and they paid it, you say up until the payment——

Mr. Hull: Your Honor please, I object to this question, we think——

Mr. Laney: It was preliminary; I will withdraw it.

Q. You say they did pay you up to January, 1942?

A. They paid the——

Q. Monthly benefit?

A. Monthly benefits until January 1st, '42.

Q. Now, I will ask you whether you have gotten [66] any better or whether you have gotten worse since they first started paying them there in '35?

A. Oh, it has just extended all over my system, arms and everywhere.

Q. I will ask you this, then, whether it has gotten better or gotten worse. A. A whole lot worse.

Q. Now, I will ask you whether up to the time when you filed your suit in this case, whether it had progressed and got better or whether it got worse?

(Testimony of Thomas J. Hughes.)

A. Got worse.

Q. Now, during all of that time from '35 on to the present time, have you been able to do any work?

A. No work whatever.

Q. Now, I will ask you whether at times you have tried to work?

A. Oh, yes, several different times.

Q. What have you tried to do?

A. Well, I tried to drive a tractor once and tried to do different things, and just so much pain put me down, put me to bed.

Q. About how many times if you remember, have you tried to drive a tractor?

A. Well, not very many times. I, of course— [67] it is hard to remember back six years, but it wouldn't be very many times altogether because I wasn't able to, had too much pain.

Q. And what effect did it have on you when you tried to drive a tractor?

A. Well, so much that I just—I had to go to bed, lie down, and lots of time I'd lie down in the field while I was out in the field.

Q. And I will ask you whether you recall one occurrence of trying to teach a Mexican boy or show him how to drive a tractor, or some boy how to drive a tractor?

A. Oh, yes, I got clear down that time, I had to go to bed for three or four days.

Q. What was done to you as a result of this, what did they have to do that night?

A. I don't quite understand the question.

(Testimony of Thomas J. Hughes.)

Q. Well, when you tried to drive the tractor what effect did it have on you that night?

A. It had the effect on me, I had so much pain that I couldn't do—I had to go into the house.

Q. And what did anyone do to you for the pain?

A. Well, my wife put on that electric pad and gave me different kinds of aspirin and some other different kinds of pills they take for pain.

Q. And could you sleep? [68]

A. Couldn't sleep at night, many nights, never slept at all.

Q. Now, before you became ill and before '35 some time, what did you do, just in a general way?

A. Well, I ran a ranch over there and I had a hay bailer, I had my own hay, I had my own harvesting and thrashing machine, I did all of that kind of work and any kind of work to do, irrigating, plowing, or any kind of ranch work there was to do.

Q. Well, since you applied for your total disability benefits there in '35, have you been able to do any of that? A. None at all, none whatever.

Q. And I will ask you if you do drive an automobile at times?

A. I do drive a pickup sometimes and sometimes I drive my other car, I go to church Sundays, but very little. I never drive to Phoenix hardly any more. This arm got so bad, pretty near lost the use of it (indicating left arm).

Q. I will ask you whether that has been true ever since '35?

(Testimony of Thomas J. Hughes.)

A. Yes, and it is bothering both arms and both hips.

Q. How about your back?

A. Well, in the back it has been awfully bad. [69]
It just bothers all over now.

Q. How about your feet and your ankles?

Mr. Hull: Your Honor, I object to leading the witness.

A. My feet and ankles is in pretty bad fix especially when I walk, move and walk, starting down, I can't go any higher.

Q. Well, now, driving a car, are you always able to drive a car?

A. Not always. I can't use that arm at all.

Q. You are speaking of your left arm?

A. Yes.

Q. How about your ability to write or do anything that requires any job that requires sitting and writing?

A. Well, it hurts in my shoulder up here and forearm here.

Q. Well, can you sit still for any great length of time?

A. Well, not very well, sit still too long, I get pretty stiff and goes to paining and hard for me to get about.

Q. Go ahead, tell the jury a little bit further about to what extent this pains you, just tell them exactly what the facts are.

A. The pain is so bad—any of you ever had a [70] toothache? There is no comparison to what this pain

(Testimony of Thomas J. Hughes.)

is, and it bothers me whenever I walk or move, and sometimes when I am—even now, sitting still now, it would not be so bad, but the minute I start to move it starts to pain. I raise my arm up (indicating). Now it is pain. That is as far as I can go up with. The shoulder pains when I move this arm, and the pain in my knees and ankles when I walk.

Q. And whenever you attempt to do any work that requires any physical effort, what effect has it on the way of pain—in the way of pain?

A. It has effect—I just have to take a lot of stuff for pain. Sometimes lie down, go to bed.

Q. Now, who runs your ranch now?

A. I have my foreman that runs it, working foreman, and he is the one that has been with me from, well, ever since the time I got hurt.

Q. What is his name?

A. His name is Manuel Vieremontez.

Q. And he manages and runs the ranch?

A. Well, he does all of the work, looking after the ranch, outside, everything.

Q. Now, Mr. Hughes, I believe you are a member of the Council of the Salt River Valley Water Users' Association? [71]

A. Yes, I am.

Q. How often do you have meetings ordinarily?

A. Well, as a general thing we have what we call a quarterly meeting. That would be about four meetings a year, and in some instances we have what we call a special meeting, and, I don't know, sometimes we might have one——

(Testimony of Thomas J. Hughes.)

Q. Were you on the Council long before you got hurt?

A. I have been on the Council for the Salt River Valley Water Users' before I got hurt for several years.

Q. Then I will ask you whether you are on the School Board, your local School Board there?

A. Yes, I am.

Q. And where do you usually have meetings?

A. Well, we have them over at my home lots of times, and sometimes we have them at the school, not very often.

Q. Why do they have them at your home?

A. Well, lots of times I am not able to go over there.

Q. And when you do go over, do you always drive your own car or not?

A. No, sometimes some of the boys drive for me.

Q. And when you are obliged to attend a meeting [72] of the Council of the Water Users' Association, do you always drive your own car there?

A. No, sometimes I come with the members of the Council that live over in Mesa, and sometimes other parties. Some of my neighbors there come and other times I would come as far as Tempe in the pickup and come over on one of the busses.

Q. Now, Mr. Hughes, in the course of the management of your ranch and before you were disabled, explain a little further what you did. Did you go out in the fields—what did you do?

(Testimony of Thomas J. Hughes.)

A. Well, I just done all kinds of work on the ranch and went through the fields and irrigated the alfalfa and wheat, and just done all kinds of work that a farmer would do. I could do a whole lot of it even then, oh, many years ago.

Q. Are you able to do any of that work now?

A. No, I can't do it now.

Q. Before you were disabled what did you do, if anything, in the way of repairing your own machinery there?

A. Yes, I used to repair a whole lot of the machinery, the harvester and the bailer.

Q. Are you able to do any of that now?

A. No.

Q. Are you able to walk out in the fields and [73] direct the Mexicans or the hired hands?

A. Well, I haven't been out in the fields for a long time. I don't do that at all. I just depend on my men. I am not able to do it.

Q. Before you were disabled did you used to do any milking?

A. Yes, we did. I milked several cows.

Q. Are you able to do any of that now?

A. No.

Q. Or have you been since '35?

A. None whatever.

Q. Who do you have to attend to the dairy herd?

A. I have a regular man that looks after the dairy herd and does all of the milking.

Mr. Laney: You may take the witness.

(Testimony of Thomas J. Hughes.)

Cross-Examination

Mr. Hull:

Q. Mr. Hughes, what was your occupation back in '35 when you fell on the place and injured your back?

A. My occupation was a farmer. I was right there at my own home.

Q. Your occupation was that of a farmer and that of supervision of farms, isn't that true?

A. Well, I was just an ordinary farmer living on that ranch running it. I don't know what you call it.

Mr. Hull: I'd like to have this marked for identification, please.

(The document was marked as Defendant's Exhibit A for identification.)

Q. (By Mr. Hull): Your principal duties were supervising farms at that time, were they not?

A. I done everything.

Q. Didn't you supervise and look after the running of a ranch and have hired men and milkers and other sorts of ranch hands to do the actual physical work on the ranch?

A. I had one man to help me run the ranch, just help me do the work, do the milking and driving tractors, and everything else.

Q. I want to hand you for identification Defendant's Exhibit A, and I will ask you if you signed that? That bears your signature—I am just asking you about your signature, Mr. Hughes. You can read it if you'd like to.

(Testimony of Thomas J. Hughes.)

A. Yes, that is my signature.

Q. Did you fill in those blanks—is that your handwriting in there?

A. Which are you asking about now? Any special one of these? [75]

Q. No, I want to know if that is in your handwriting, that document.

A. Well, I think it is, I mean I know it is, that signature.

Q. Very well (taking document from the witness).

A. All right—just a minute. Are you ready for this?

Mr. Hull: What did you say, Mr. Hughes?

Mr. Laney: He asked you if you are ready for it. You asked about it and he said, "Just a minute."

A. I think every bit of the writing on that, I think I wrote that with the exception of this, and if I remember correctly on that, that supervision of the farm, it has been quite awhile ago, but I was just hurting to doggone bad I read that over and I think my wife's cousin either wrote some of that in, it is right there, I believe, I am not sure, but the rest of the writing is mine.

Mr. Laney: Is that offered in evidence?

Mr. Hull: No, this is your case, Mr. Laney. I am cross-examining your witness.

Q. You were born and raised on the farm, Mr. Hughes? A. Yes, sir.

Q. You have been a farmer all of your life, [76] haven't you?

(Testimony of Thomas J. Hughes.)

A. Well, I have been a farmer most of my life but not all of it. As I told you some time ago, that I worked some at the mines and different places, but I still was living on the farm when I was younger.

Q. You were born on a farm in Kansas, weren't you? A. Yes.

Q. And you were engaged with regular farm work back there in Kansas as a boy?

A. Oh, yes.

Q. So your principal occupation during your entire life has been farm work, related to agriculture, isn't that true?

A. Well, a good deal of it, you might say.

Q. Now, in addition to that you have had the equivalent of four years college education, haven't you?

A. Well, I had, I don't know whether—yes, I expect you would, but some of it was, in them days we didn't have a high school, we just had a teachers college or a normal school, and I think that I spent either three or four years in both of those schools together.

Q. Did you get a teacher's certificate or [77] degree? A. No.

Q. But you spent a couple of years in a normal school at Kansas State and a couple in Arizona, isn't that right? A. Yes.

Q. And what were you majoring in in that study? Were you trying to fit yourself to be a teacher?

A. Well, I—when I first started to college I wanted to be—studied to be a teacher.

(Testimony of Thomas J. Hughes.)

Q. Have you ever done any teaching?

A. No. I have not.

Q. You are at the present time president of the rural school, No. 13, Maricopa County?

A. Yes, I am.

Q. How long have you been on that school board?

A. Well, I don't know. I think just about as long as I been on the water Users'.

Q. 16 years?

A. Well, I'd have to look up the records, but I think it is a long time.

Q. Goes back prior to '35, isn't that true?

A. Oh, I think so.

Q. Now, you attended board meetings, did you not, on that school board?

A. I did when I could. Sometimes I couldn't [78] attend them over at the school house, and we have board meetings at my home.

Q. Do you recall since '41, starting with '42 up until January of this year, whether or not you missed any meetings of the school board during that entire period?

A. I didn't get the last part of that, Mr. Hull.

Mr. Hull: Would you read that, please, Mr. Reporter?

(The last question was read by the reporter.)

A. Well, I don't remember whether I did or not, and——

Q. (By Mr. Hull): Do you recall missing many meetings, or missing meetings frequently when called upon?

(Testimony of Thomas J. Hughes.)

A. Well, in case they have meetings over at my home when they want to have them. I am not able to come——

Q. It is true, then, that so far as you know, you have attended at least the majority of the meetings on that school board, is that right?

A. Well, to some of them I know I didn't attend, but I couldn't tell you whether I attended the majority of them, so I don't remember.

Q. When does your term expire?

A. I think it is two years yet, one or two years. I don't remember it. [79]

Q. Now, in your capacity as a member of the Rural School Board No. 13 of this County, you have passed upon such matters as the budget for the school district?

A. Yes.

Q. You have done that each year you have served on the board, is that right?

A. I don't think I missed any of them—no, I don't think I missed any of them, but sometimes we passed on that budget they would come over at my home and sometimes we have it down at the principal's home down at Tempe.

Q. But you do pass upon the budget each year?

A. The Board does.

Q. You are a member of that Board?

A. Yes.

Q. And the President?

A. Yes.

Q. How many members are there on that Board?

A. There is two more.

Q. How many schools are there in your district?

(Testimony of Thomas J. Hughes.)

A. Just two.

Q. How about Rural School No. 13, how many children do you have there, do you know?

A. I couldn't recall just now what we have there.

Q. About 175, would you say?

A. Well, there is over a hundred, I don't know how many over a hundred.

Q. Do you know how many teachers you have there?

A. No, I don't just exactly. I couldn't tell you.

Q. Would you say a half dozen or more?

A. Yes, I think more than that.

Q. The other school in that district is the Guadalupe School? A. Yes, it is.

Q. How many children do you have in that?

A. We have about as many over there as we have in the other school.

Q. Isn't a fact you have twice as many children than you have a Guadalupe?

A. Well, we might have. I made no check of it and we won't until we make the budget, and we will know.

Q. When do you make a budget?

A. Well, it will be along later in the spring for next year's budget.

Q. What do you put in the budget when you prepare this budget?

A. Well, we put in all of the teachers' salaries, expense of operation of the school, [81] maintenance and expenses, and everything of that sort.

(Testimony of Thomas J. Hughes.)

Q. You put in there all of the money that you expect to spend for the next year?

A. Next year, yes.

Q. Do you put in there any receipts that you expect to get from any source by way of revenue to offset your anticipated expenses?

A. I don't think we have been getting anything except our expenses.

Q. Now, at the present time you are building—your school board is building an addition to the Guadalupe School, is that right?

A. Well, they have to do it some time but I don't know whether they got it going or not. I haven't been over there for some time.

Q. How long ago did the School Board purchase this building for the Guadalupe School?

A. They never purchased that building for the Guadalupe School.

Q. Do you have it under lease? A. Yes.

Q. Who is the owner of the land from whom the School Board leases that school?

A. The land with the building belongs to a lady in Tempe by the name of Mrs. Roberts. [82]

Q. Do you know what type of lease the School Board has on that particular building?

A. Well, no, I don't. What do you mean, Mr. Hull?

Q. I mean what kind of lease; how long a lease?

A. Well, I think we have got a kind of long term lease on it. I don't know the expiration of it or how long it runs.

(Testimony of Thomas J. Hughes.)

Q. When did the School Board take that lease; the last lease?

A. Well, I think it was probably a year or more ago. You see that building belonged to a Mexican man over there and Miss Roberts bought that building and we leased it from her. I don't just remember the date of that lease.

Q. You, and I mean now the School Board, leased from this Mexican prior to the time that the lease was taken with this Mrs. Roberts?

A. Yes, we did.

Q. With a man by the name of Joe Soleris?

A. Yes, that is the boy.

Q. You, yourself, as a member of the Board, entered into negotiations leading up to the taking of this lease, did you not?

A. The Board passed on the leasing of the building from Miss Roberts, but I think before that [83] time it was just an out-and-out lease. I don't remember what the lady there had in mind about the old place, I don't remember seeing it.

Q. What I mean, Mr. Hughes, is you, yourself, discussed the terms of the lease and the terms and the arrangements that would be made for this building?

A. Well, the Board discussed it there together. It wasn't up to me what to do.

Q. In the building of this new addition to the school, you have employed a contractor for that job, have you not, is that right?

A. Well, the other members of the Board, I guess,

(Testimony of Thomas J. Hughes.)

done that. I don't know just whether they had a contractor on that or not, or whether it is day work.

Q. Well, if any contract was signed, was it brought to your attention?

A. Well, they might have passed it up if I hadn't been there at the meeting, the last meetings that they had just before that. I don't remember. I don't know of a contract for that building. I don't know whether it is put on there by day or whether it is just an out-and-out price for doing the work.

Q. But you do remember that the School Board was engaged in a program for building that addition to that school, isn't that true, the School Board of which you are a member?

A. Well, I don't know so much about this last one, but the others, I do. This last building you are talking about, I can't tell you about that. I don't know.

Q. Well, when were those other additions put in there that you are talking about?

A. Oh, the other one we built it at different times. I don't know just what times they were.

Q. Were you consulted on the arrangements for the construction of the additions, Mr. Hughes?

A. No, I don't think so—you mean this last one?

Q. No, I am talking about the other ones that you just mentioned.

A. Well, I don't remember so much about those. It is just an addition built on. I think the whole board passed on the whole thing in one meeting for those things.

(Testimony of Thomas J. Hughes.)

Q. You attended that meeting, didn't you?

A. Yes, and I think it was over at my home, the last meeting we had about that.

Q. Who presides at the meetings of the Rural School Board No. 13 when you had those meetings? [85]

A. Well, just the three of us there and we are all three trustees.

Who was the chairman on those occasions?

A. Well, it depends on who the President is. They have been changed out there sometimes.

Q. Well, you are the President now?

A. Yes, but I haven't been all the time.

Q. Over the last six or eight years have you been the President most of the time of that School Board?

A. Well, I don't think it would go back eight years. I think probably, oh, about for that many. I am not sure, I can't tell you, Mr. Hull.

Q. What, in addition to the things that we talked about, like the preparation of the budget and the matters of additions to the schools and the leasing of buildings, does the School Board do over there; what other activities does it engage in?

A. Well, not very much that I know of.

Q. Well, do you hire and fire teachers?

A. No, we don't, we have a principal that looks after that.

Q. What do you do about consulting the policies of the School Board now with reference to the policies as to hiring or firing teachers? [86]

A. I think we leave that up to the Superintendent

(Testimony of Thomas J. Hughes.)

and put the responsibility on the lady that is the Superintendent.

Q. And who consults with the Superintendent?

A. The School Board.

Q. Now, how many school busses do you operate over there? A. We operate two.

Q. How long ago has it been since you acquired the second bus?

A. Oh, we have had a second bus, two busses on there for the last, oh, I think four or five years, probably, as near as I can remember.

Q. Are you at the present time, and I am again referring to the School Board, negotiating for the purchase of a new International school bus, another one to supplement the two you have?

A. No, they have already bought one a long time ago, got it in operation.

Q. Who attends to the hiring or firing of these bus drivers? A. The principal of the school.

Q. You leave that up to him? A. Yes.

Q. When you have these meetings of the School Board, does the principal attend, the principals [87] of the two schools, I mean?

A. You mean the superintendent, the principal?

Q. Yes.

A. Yes, pretty near all the time they attend, I am pretty sure, unless it is something out of the ordinary that they might bring up.

Q. Does he keep the School Board informed on the matters within his sphere of operations and the operations of those schools?

(Testimony of Thomas J. Hughes.)

A. Well, if they want to do anything in the way of remodeling or building, they call the School Board out to go and take it up with the school teacher before they done anything.

Q. So the School Board ultimately desides the policies of things like that?

A. Well, I think they would, yes.

Q. Does the School Board keep written minutes of the meetings?

A. Yes, we have those written minutes and I think they have a book on those minutes. I think the principal has them there on the different meetings that we have and the minutes of the meetings.

Q. Well, do you, as President of the School Board, sign those minutes as chairman of the meetings? [88]

A. Well, I think probably I signed some of them, but I don't remember we had very many of those meetings where we had minutes signed that way.

Q. Now, who signs the vouchers for the expenditures of the Rural School District No. 13?

A. The Board of Trustees.

Q. Isn't it true that your personal signature has to be on all of those checks?

A. Yes, it is unless I am away from home, I can't be found—oh, you mean the vouchers?

Q. Yes.

A. The trustees sign the vouchers, sometimes there is three of them and sometimes two. If they happen to be one away, why, two signatures are on there.

(Testimony of Thomas J. Hughes.)

Q. But you put your signature on there as a member of the Board? A. Oh, yes, yes.

Q. What do those vouchers represent, generally speaking, in the way of expenditures?

A. They represent money to buy supplies and books, pay teachers' salaries and gasoline for the busses and general expenses of operation.

Q. Do they run in rather sizeable amounts, in dollars, per voucher, I mean; do they run up into big figures? [89]

A. Well, not so very large. Salaries on teachers are put on a separate voucher, I think, and then separate vouchers for the expenses or material furnished—for stuff that we purchase.

Q. But they will average up to around four or five hundred dollars, won't they, per voucher, on the average? A. How many?

Q. Four to five hundred dollars per voucher?

A. Oh, I think some of them would run higher than that, I am not sure. I couldn't give you a correct answer.

Q. Very well. You have a secretary for the Rural School Board No. 13?

A. We have a lady that keeps all of the books and everything.

Q. Do you, from time to time, consult with her with reference to these books and records to see if they are in shape?

A. Well, not so very much. We do look over the vouchers and see that they—the bills is on there that the voucher represents to pay.

(Testimony of Thomas J. Hughes.)

Q. You check the vouchers then against——

A. Well, the Board generally checks those when they bring the vouchers around to sign them, generally for bills, expense, electricity and all [90] of the regular expenditures.

Q. How many acres of irrigated land do you own in the Salt River Valley at the present time?

A. I own 412 acres.

Q. And where are those acres located with reference to the City of Phoenix?

A. With reference to what?

Q. The City of Phoenix where we are now.

A. Well, it is south and east of Tempe. It would be a better description three and one-half miles southeast of Tempe, or about 13 miles, I'd say, or 12, from southeast—from Phoenix.

Q. Then it lies much closer to Tempe than it is to Phoenix?

A. Oh, yes.

Q. Now, is that land divided up so that a part of it we could call your home ranch and the other part by some other terms? Do you use those terms in referring to your ranch?

A. Well, those ranches were bought from different people, and all of the ranch on the south side of the main canal that runs through there, we call that the Meyers Ranch.

Q. Well, how long have you lived on that ranch?

A. I have lived there continuously from '17; that is, the early part of the year. [91]

Q. During all of that time has the land been cultivated?

(Testimony of Thomas J. Hughes.)

A. Yes, sure, it has been cultivated.

Q. And what crops have been raised on that land over there?

A. Well, there has been all kinds of crops, different crops at different times. One time it was all in cotton, the whole ranch, and other times it was in wheat or barley and different crops, and then it has been leased out for vegetables and different things like that.

Q. Well, in the past six years have you been directly engaged in the raising of grain and alfalfa?

A. The past how many years?

Q. Six years.

A. We raised some grain, but mostly alfalfa, because we have a dairy herd there that you can feed on that stuff.

Q. You have dairy cows there, don't you?

A. Yes, we do.

Q. And what grains do you raise on the ranch?

A. Well, you have to ask me in what year. I don't know. This last year we had barley and I think the year before barley, and on the rest that we had there was in alfalfa. [92]

Q. Let's get at it this way, then. You raised barley every year for the past ten or twelve years?

A. I think there was some years we didn't have any barley at all, if I remember correctly.

Q. Well, you would say that primarily your crops out there are alfalfa and barley?

A. Well, it has been for the last two or three years there has been alfalfa and barley, but that is the land that we have the dairy on, but the land that is leased out to the lettuce companies, they change it

(Testimony of Thomas J. Hughes.)

around and put in honeydews and lettuce, and different stuff in there.

Q. Then you lease land out in addition to raising crops on a part of the ranch, is that correct?

A. Yes, 185 acres that is leased to the Hilvert Lettuce Company.

Q. I am just talking about these 160 acres that you mentioned first. For the last three years, then, your crops have been primarily alfalfa and barley, if I understand you correctly, is that right, Mr. Hughes?

A. You didn't state just which—

Q. Well, I mean the home ranch where you live, your main crops the last three years, didn't you say were barley and alfalfa?

A. Well, I think so. On barley, well, there [93] was one year I believe we had wheat sometimes three or four years ago, but I can't remember back just what was in it, but some was in grain and some in alfalfa.

Q. Well, since '35, have you raised any crops on the ranch different from the type of crops that were being raised on the ranch prior to the time you got arthritis?

A. Well, we have never raised anything there, I don't think, but we have raised wheat and barley and alfalfa, I think, if I remember correctly.

Q. How many cows are included in your dairy?

A. Oh, I think there is about 60 that they milk, 55 or 60.

Q. Sixty cows that you milk?

A. Fifty-five or 60, somewhere along there.

Q. Is that an increase or decrease over the num-

(Testimony of Thomas J. Hughes.)

ber of head of cows on the ranch, milk cows, before you had arthritis?

A. Well, I think it has increased, I am pretty sure it has.

Q. Well, about 15 or 20 head?

A. Well, I should say about that, probably more. I don't just remember what we had there at the time.

Q. Now, do you employ a man to milk the cows?

A. Yes, I do.

Q. His name is Virgil Patterson?

A. Well, Virgil Patterson is not working for us any more. He went down to visit some of his people down in Oklahoma. He has gone for some time.

Q. During all the time that you have lived on this ranch out there, have you hired someone to milk the cows?

A. Yes, I have.

Q. What do you pay the man who attends to the milking of the cows?

A. The man that milks the cows, he gets \$150 a month regardless of how many cows he milks, and he gets three dollars extra for every cow over 50 cows.

Q. And then in addition to that he gets his house, his lights and his milk, milk for his entire family, is that right?

A. I think so; I think so.

Q. Who pays him this \$150 a month for his services?

A. Sometimes I pay him and sometimes my wife pays him.

Q. You pay him by check, don't you?

A. Yes, mostly by check. I think pretty near [95] all the time by check.

(Testimony of Thomas J. Hughes.)

Q. Drawn upon accounts in what bank?

A. Well, sometimes it is on the Valley Bank here, but not very often; mostly on the Tempe Bank.

Q. You have an account, then, in the Valley Bank, is that right? A. Yes.

Q. In Phoenix? A. Yes.

Q. Is that your personal checking account?

A. Well, it is just an account where I got the money. Nobody's check is recognized there, only mine. Well, it is our own money, belongs to the community property.

Q. Who pays the man who milks the cows for this three dollars extra per head for cows above 50 that are milked?

A. Well, that is paid him every two weeks. Sometimes my wife will pay him, sometimes I will pay him.

Q. Who makes the accounting to determine whether or not the man has milked cows above 50?

A. Well, he turns it in himself.

Q. Who does he turn it in to?

A. He turns it in there to me or to my wife and says how many cows he has over 50 cows. [96]

Q. Then in instances where they turn it over to you, do you check it to see whether or not—

A. No, I never bother about it.

Q. You take his word for it?

A. I just take his word for it.

Q. You have milking machines on the ranch, haven't you? A. Yes, we have.

Q. How many do you have?

A. We have three.

(Testimony of Thomas J. Hughes.)

Q. Did you at any time, Mr. Hughes, personally do any milking on the ranch yourself; did you ever milk cows on your ranch? A. Personally?

Q. Yes.

A. You mean with milking machines or by hand?

Q. I don't mean that, no.

A. What do you mean?

Q. I mean did you ever personally milk cows on that ranch?

A. Well, before I got hurt I used to milk them all the time.

Q. You did?

A. Yes. That is, I had a man helping me and we milked them by hand.

Q. When did you buy the milking machines?

A. Oh, I don't remember. We have had them in quite awhile. We bought two sets of milking machines. We bought a DeLaval, and that wasn't satisfactory and we didn't keep them, and then we put in a Surge machine.

Q. Well, do you mean, Mr. Hughes, that at one time you actually did the milking?

A. I did the milking before I got hurt. I had a man helping me. We used to work in the fields and then milk so many cows.

Q. Even before you had arthritis you merely assisted in the milking, is that right; you assisted the man that did the milking, rather than do it yourself, isn't that true?

A. I think I done it myself and the man helped me, I think that is the way it was.

Q. I'd like to ask you a question about your

(Testimony of Thomas J. Hughes.)

deposition. Now, Mr. Hughes, do you recall the event of taking your deposition in my office on July 24th of this year? A. Yes.

Q. Now, I am going to call your attention to some questions which appear on pages 36 and 37 of the deposition, and I will ask you first if at that time you were sworn to tell the truth and the whole truth, and nothing but the truth, were you? [98]

A. Yes.

Q. Now, on that occasion, I'd like to ask you if you were asked these questions and if you gave these answers: Now, if you will just listen, please, I will start to read from line 17 on page 36: "Question: Mr. Hughes, you have been milking your home cow, haven't you, the milk for your house? Answer: No, I get that from the milking machines. Question: Didn't you milk a cow for the milk for your home up until the last year or two, say? Answer: No, I don't remember of ever having milked any cows. I think they—the milkers we have, my wife generally told them what cow they wanted milked for the house. We had some Jerseys and Guernseys, and finally they would bring in whatever milk she would want from a certain cow, whether it is Jersey or Guernsey or Holstein. The milk was too rich from the Guernsey, we don't have any Guernseys or Jerseys now. Question: Did you, yourself, ever do any milking on the ranch? Answer: No, I never done anything, only before I got hurt I used to help the man with the milking, but after I got hurt I have never been able to do anything at all in the way of milk-

(Testimony of Thomas J. Hughes.)

ing.” Now, I am asking did you so testify on that occasion?

A. Well, if you got it that way, I think you [99] got that wrong.

Q. I haven’t, I am not asking you if I have it that way, Mr. Hughes. Let me have the original deposition so I can show it to the witness. I am reading from line 17 of page 36, to and including line 10 on page 37.

A. What time do you go back to in this thing? Are you asking a question before I got hurt or after that?

Q. Well, I am asking if you have testified as I have read it there.

A. You asked this question: “Did you, yourself, ever do any milking on the ranch?”

Q. That is right.

A. Now, I just told you a little while ago that before I got hurt, I was under the impression that you wanted to know if I did any milking on the ranch since I got this accident, but before this accident, before I got hurt, I milked cows right along on the ranch and had a man help me.

Q. Mr. Hughes, just let me ask this question—

Mr. Laney: Oh, we will stipulate that is what he said. We object to it because that is not impeaching anything. He says—it is just quibbling over—

The Court: You stipulate that was the answers?

Mr. Hull: Very well, I’d like to ask you, Mr. Hughes, you signed this deposition, did you not?

A. Yes, sir, I did.

Q. Well, you read it over before you signed it?

(Testimony of Thomas J. Hughes.)

A. Well, I read it over but I should have gone over it again, I should have if there is any errors in it, because I am not here to give you any information only the facts what you want.

Q. Mr. Hughes, you made some corrections in it before you signed it?

A. Yes, I did. I probably ought to have made some more in it.

Q. How long has Manuel Vieremontez been your foreman down there?

A. Manuel has been working for me before the time I got arthritis.

Q. Was he the foreman before you got arthritis?

A. No, he was not. He just—I was looking after the ranch myself and he worked there for me.

Q. Are you paying him more now than you did at that time? A. Oh, sure, a whole lot more.

Q. Have his duties increased as time has gone by?

A. Well, the cost of living has gone up and the man is entitled to more pay. [101]

Q. How much does he earn at the present time?

A. Well, some weeks I think probably would be \$50 a week and other weeks might be a little less. I couldn't recall just the amount. He turns in his own time and I pay it, or my wife, pays it.

Q. You pay that by check too? A. Yes.

Q. Now, in addition to the salary that you pay him you also allow him the use of the house and for lights, water and milk for himself and family, is that right? A. Yes, without any charge.

Q. Has Manuel Viermontez been with you during

(Testimony of Thomas J. Hughes.)

all of this time continuously, without interruption?

A. Oh, yes, yes.

Q. Now, you consult with your foreman from time to time with regard to ranch policies, don't you?

A. I don't consult with him very much, because he goes right along and runs the ranch just the same as if I wasn't there. He knows what to do. He might change some of the fields and plant a different crop, and I tell him if he wants to change those fields and plant different crops in it, why, change them.

Q. In July of this year, '48, you and your [102] wife took an automobile trip to Santa Ana, California, didn't you?

A. No, my wife went over there, and daughter, and later my son and I went over, the one that is a doctor.

Q. You drove over in an automobile, didn't you?

A. No, I rode, I didn't drive. I never drove an inch of the way.

Q. I mean you rode over in an automobile?

A. Yes, I did.

Q. How long did it take you to drive over there?

A. Well, I think that we drove over probably, I think in one day, if I remember correctly.

Q. And you drove back?

A. No, I didn't drive at all.

Q. I mean you came back in the automobile?

A. Yes, I did.

Q. You were a passenger in the automobile, weren't you, coming back?

A. My son was driving. It was his car. I wasn't paying any fare.

(Testimony of Thomas J. Hughes.)

Q. Did you stop and rest on that trip either going to Santa Ana, California, or coming back?

A. How is that?

Q. Did you stop to rest during that trip going [103] either way?

A. We stopped quite a little while in Blythe, over here.

Q. Was that for meals? A. Huh?

Q. For a meal, for eating purposes?

A. Well, we stopped to rest there some and we got lunch before we left. I don't remember how long we stopped.

Q. Now, you came back after you had been over there a short time, isn't that true?

A. I come back—I stayed there about a week, I think.

Q. Didn't you come back because you felt that Manuel Viermontez and the milker could not operate the ranch without you being there?

A. No, I come back because I was hurting awful bad with arthritis. It was just bothering me so much over there I couldn't stand to stay over there, and I had this home leased over there for a couple of months, and I couldn't go back, I wouldn't go back because I had too much pain.

Q. Did you ever tell anybody here in Arizona when you came back that you returned early because you could not trust these two people?

A. No, I didn't, never told nobody. [104]

Q. Did you go directly to the ranch when you came back from this trip?

A. Yes, we went directly home.

(Testimony of Thomas J. Hughes.)

Q. Did you check to see what had been done on the ranch during your absence? A. Do what?

Q. Check with your foreman to see what had been done on the ranch during your absence?

A. No, I didn't check anything. I checked into bed and went to sleep.

Q. Do you determine what crops will be raised on your ranch, or does your wife do that?

A. It is not often we change crops on these ranches and I always talk to the foreman about the change, if any, if there is any to be made.

Q. You sometimes make arrangements yourself for the repairs of the buildings or machinery on your ranch, don't you?

A. We haven't been doing any repairs or building at all since I got hurt, you might say, none that I know of.

Q. You don't recall of any repairs having been made? A. No, I don't.

Q. Now, in addition to these 60 cows which constitute your dairy herd, do you have any steers?

A. Yes, we have some dry stock.

Q. How many head of dry stock do you have?

A. Oh, I don't know how many we got now, probably 75 calves and yearlings and different things; probably a little more. I don't just remember.

Q. Does Manuel Vieremontez look after those cows?

A. He looks after the whole ranch, everything.

Q. Now, those 75 or so head of dry stock is an increase in numbers over the number of head of

(Testimony of Thomas J. Hughes.)

cattle that you had on that ranch before you got arthritis, isn't that right?

A. Well, it is an increase that we have every year; that is, we have livestock every year on the ranch from growing up calves, and sometimes we have more than others.

Q. Now, in '45 and '46, didn't you run short of help out there at the ranch, in '45 and '46?

A. Well, I don't remember so much about the shortage of help. There has been a shortage of help in the Valley all the time, not only during war time.

Q. I will ask you if it is not a fact that during '45 and '46 that you personally milked some of the cows?

A. Not that I remember of. [106]

Q. You don't recall whether you did or not?

A. No, I don't remember it at all.

Q. Now, who feeds the calves?

A. Manuel feeds the calves. The milkers that milk the cows generally feed the calves until they are, oh, probably three or four weeks old, and then the rest of the bunch is fed different feed and Manuel looks after this.

Q. You attended to the feeding of six of those calves, did you not, during '48?

A. Done what?

Q. Feeding of six calves, a half dozen of those calves, didn't you feed them regularly yourself?

A. No, I never did.

Q. Do you know Mr. and Mrs. Eddie Moore?

A. Yes, I do.

Q. They have worked for you?

A. Yes.

Q. Did you have occasion to demonstrate to them

(Testimony of Thomas J. Hughes.)

the use of milking machines, how to use milking machines on your ranch?

A. I don't think so. I think the milker that was here before Eddie showed him how to milk them and I had the Surge man send a man over at different intervals to show him how to operate those machines.

Q. Who made arrangements with this Surge Company?

A. I called him up and told him to send him over.

Q. Do you recall now, Mr. Hughes, whether or not you did demonstrate the use of milking machines to these people?

A. I don't know. I didn't demonstrate the use of milking machines that I know of. I can't recall it.

Q. Now, I believe you stated you had run a tractor on two or three occasions, is that right?

A. Yes.

Q. Have you been running a tractor at all this year?

A. None that I know of.

Q. When you ran the tractor, for what purpose was it being run?

A. Well, I don't recall just for what purpose it was being run. I think probably we were putting some borders up some place.

Q. What do you mean by that, Sudan grass?

A. No, that is the border that keeps the water on one land.

Q. When was that done?

A. Well, that was this last year, this last [108] summer.

Q. How long, speaking of days, did it take you to install those borders?

(Testimony of Thomas J. Hughes.)

A. Oh, it wouldn't take over a day to install the whole thing, I don't think.

Q. Did you run the tractor all day, personally?

A. No, I did not.

Q. Who helped you?

A. I think there was a young fellow by the name of, I can't think of his name. We had different fellows there that drove tractors for us. I think one of Hilbert's or one of Reimer's mechanics, tractor drivers, drove it most.

Q. And the tractor is used on your ranch to cut hay, is that right? A. Yes, it is.

Q. And also for disking purposes?

A. Yes.

Q. And have you in the last few years operated that tractor for disking purposes?

A. For disking?

Q. Yes.

A. Yes, we use it every year for disking.

Q. I mean have you yourself ran the tractor for disking?

A. I don't recall running it. I might have. [109] If I did, though, it would be for just a very short time because I couldn't run it very long at the most.

Q. Well, have you, yourself, operated that tractor to cut hay during the past few years?

A. No, there isn't any of my men that operated it either. That hay cutting has all been contracted out, different men take a contract cutting that.

Q. Who arranges for these contracts?

A. Well, we have a man that cuts it and this

(Testimony of Thomas J. Hughes.)

foreman tells him when the stuff is ready to cut, "Come and cut it."

Q. Do you talk to the man that does the hay cutting?

A. Well, sometimes I do, sometimes I don't see him at all.

Q. Did you make the financial arrangements with him for paying him for the work that he does?

A. I write the check for him.

Q. Well, do you make the deal in the initial instance as to how much pay he will get for doing that particular job?

A. Well, it is cut by the acre and we know just what the man is entitled to and I make him a check for his money.

Q. When you say "we", you mean you and your wife? [110]

A. Yes, either one. I don't know whether she makes any of those checks for the man that does the hay cutting or not. She would if I wasn't there.

Q. Since you have had arthritis you have acquired more land that you had before then, isn't that right?

A. Well, I don't just remember, but I can get the records if you want to know. I got a deed to the property that I purchased.

Q. Maybe this will help. Let me ask you this, Mr. Hughes: Do you know whether or not you purchased 10 acres from Myrtle Clark on July 5th, 1940, Myrtle Clark?

A. Yes, I purchased that.

Q. And then did you in '42, November of that year, purchase 160 acres, the Northwest Quarter of

(Testimony of Thomas J. Hughes.)

the Northwest Quarter of Section 26, where your ranch is located, from Christopher T. Martin?

A. I bought from Christopher T. Martin 40 acres.

Q. Forty? A. Why, yes.

Q. It was not 160?

A. I have 160. The rest of that 160 I have owned for several years.

Q. So you purchased 40 acres from him in '42, [111] is that right? A. Yes, it is.

Q. Now, you gave him a mortgage on the land, did you not, back? A. I did.

Q. A \$2,000 mortgage? A. That is right.

Q. And you, yourself, signed the note and the mortgage, is that right? A. Yes.

Q. And then later on you became the Administrator for the Christopher T. Martin estate, didn't you? A. Yes.

Q. And in your capacity as Administrator you discharged that mortgage? A. I did.

Q. Now, how many acres of land, irrigated land, do you lease to others for farming purposes in this community?

A. I have 185 acres leased to the Hilvert Lettuce Company.

Q. Hilvert Company?

A. Hilvert Company.

Q. That is the Fred Hilvert Distributing Company? A. Huh? [112]

Q. Fred Hilvert Company? A. Yes.

Q. When was the lease negotiated that is now in operation for that 185 acres?

A. I don't get the question clear.

(Testimony of Thomas J. Hughes.)

Q. When was that lease entered into?

A. Well, they have an extension of two years commencing this last August, and they had it three years before, so they had it three years and they will have it in all about five and there is two years yet to go, that is this coming year, and then one more.

Q. So that over a period of five years, including a year to go in the future, the land is under lease with the Fred Hilvert Company, the same acreage?

A. Yes, they have had it for two more years. They have had it for three.

Q. So that last lease was a written lease, a written form of lease?

A. It is just a form lease, but it is not one that you would take from a regular form lease, it was just one made out on the typewriter.

Q. Did you, yourself, sign both of those leases?

A. I just signed the extension a short time ago, but the original lease I signed, but I don't [113] remember whether my wife signed it or not. I can't tell you.

Q. Then at least as to these two leases, now, the 185 acres with the Fred Hilvert Company, you entered into arrangements yourself with these people for the leasing of that land, is that right?

A. Well, they come to me, their man wanted the extension of the lease and I signed the extension, and gave it to them.

Q. What rent or rental is received by you on that 185 acres?

Mr. Laney: I object to that as irrelevant, going

(Testimony of Thomas J. Hughes.)

into that, what rent he received on his land. It seems it just takes up the time and it is useless.

Mr. Hull: May I be heard on that, your Honor?

The Court: Oh, he may answer.

Mr. Hull: What is the rental?

A. The rental is—you mean on the first part of the lease, now?

Q. Well, I mean how much do you get from the Hilvert Company?

A. Well, there is a difference in it. The last two years extension, the Hilvert Company pays for the increase in water, and before that, why, they didn't pay any, so if you want to segregate it. [114]

Q. Well, I don't know as I understand you, Mr. Hughes. What do you mean?

A. Well, the first lease was given, they paid me \$35 an acre a year and I furnished them two acre feet of water. Now, in this extension, the water is costing more and it is scarce, and they agreed to pay for that increase in rates on that water. Now, to give you an idea what that is, the water used to be \$3.50 an acre. Last year it jumped up to \$10.00, so they agreed to pay that increase, between \$3.50 and \$10.00, which would be \$6.50, so they paid \$3.25 more. In other words, in place of paying 35, it would be \$38.25 for this coming two years. You get the application now?

Q. Now, when you say that that was the arrangement, was that the arrangement that was put in this written lease you are talking about?

A. Well, it is put in the extension there.

Q. That was put in at your instance, wasn't it?

(Testimony of Thomas J. Hughes.)

A. Well, no, Mr. Hilvert knew of the cost of more water and he says, "I will just put that in there and if that ain't satisfactory, why, we will get together." I have known him a long time and he is a pretty fair fellow to deal with, so I just left it up to him. [115]

Q. So you and Mr. Hilvert arranged that?

A. That extension of the lease.

Q. That extension of the lease?

A. Yes, we did.

Q. Now, to whom, if anyone, was that land leased prior to the time that the Fred Hilvert Company took it over four or five years ago?

A. Who was it leased to?

Q. Yes.

A. I think I gave you that information once before in that record there, but at any rate, there was two different parties that leased, the S. A. Gerard Company had it for, I don't remember just how many years, and then Mr. Stoutzenberger, and I don't even know, I looked up the record, I tried to find out but I couldn't find any of the old leases. You asked for it.

Q. Yes, that is right.

A. Well, I am not able to find it. I don't know whether they are—

Q. Just briefly, then, Mr. Hughes, this land we are now talking about was leased during all of the time you have had arthritis, isn't that right, this 185 acres? A. I don't think so.

Q. Since '42, has it been leased, the last six [116] years?

A. Well, I think that Mr. Hilvert's three years

(Testimony of Thomas J. Hughes.)

lease, I think before that there might have been one year there that the foreman had it in barley or wheat. I don't remember it; I can't recall about getting those leases because I have no way of telling.

Q. They were written leases, isn't that true?

A. All the leases that we made are written leases.

Q. Did you, yourself, sign those leases?

A. Yes, I did.

Q. You made the lease arrangements?

A. Well, I signed the leases.

Q. And you can't find copies of them, is that correct?

A. No, I can't. If you want them, though, I believe I can get the one from the Gerrard Company, but I doubt about the other party because they are not here.

Q. Mr. Hughes, you, yourself, handled them with the Stoutzenberger and with the Gerrard Company as well as with the Fred Hilvert Company for the leasing of these 185 acres?

A. Yes, but get me this way, now, Stoutzenberger didn't have all of that land, that 185 acres. He [117] only had 85 of it.

Q. No, the question I asked you, Mr. Hughes, was, isn't it a fact that you, yourself, handled those leases with those people, that you, yourself, did that?

A. Yes. I thought you meant the 185 acres.

Q. Perhaps I did say that.

A. It was just 85 that Stoutzenberger had.

Q. However many acres they had, you, yourself, made the lease? A. Yes, they called me up.

Q. Now, in leasing to the Fred Hilvert Company

(Testimony of Thomas J. Hughes.)

you had occasion to go into their office on a number of occasions to discuss the irrigation program for that land, did you? A. To do what?

Q. To discuss the irrigation program for that land.

A. Oh, I haven't been in Hilvert's office until I signed that extension.

Q. Do you know Mrs. B. G. Price, the office manager for that company? A. Yes, I do.

Q. Had you on several occasions discussed with her the amount of water that was to be applied to that land during the seasons it was leased by the [118] Fred Hilvert Company?

A. Well, the only thing I remember was that they didn't furnish quite enough water for the land according to the acreage, and I think we checked that up and they changed it.

Q. You did discuss that with Mrs. Price, didn't you?

A. I made the correction over at the Water Users' Association Building on the shortage of water they had there; that is, in regard to the acreage.

Q. Do you know how long ago that was, Mr. Hughes?

A. Well, it has been quite a little while ago.

Q. Now, let me ask you this: Had you supervised the 40 acres of irrigated land south of Phoenix in addition to this land here at Tempe?

A. No, I don't. My sister wrote me from Kansas City to lease that land for her, and I put in an ad in the paper to lease it. A fellow from Avondale wanted it and he come up and said he would take it,

(Testimony of Thomas J. Hughes.)

but he didn't have any finances. He wanted it plowed up and got ready for grain, and I called on Jack Kleck and told him my sister wanted the land all plowed up. He plowed it up before and fixed it up for grain, so he did that, [119] and this fellow was to get the money, this fellow from Avondale was to get the Capital Fuel & Feed Company to finance him. He said they would guarantee it, to pay the money for it, so I went over to see Stein one day, or called him up, I forget which, and he says, "That fellow owes us \$7,000." He said, "I wouldn't finance him for anything," so I told my foreman, "I suppose while we got the land there and all, so you go over and plant that grain for her and get it ready and have it harvested and deliver it down there where the grain and barley is now, down here at the mill."

Q. What mill?

A. The Hayden Flour Mill.

Q. The barley from that 40 acres, is that right?

A. Yes, it is.

Q. Mr. Hughes, is that your barley now, or is that your sister's?

A. That is my sister's barley. I have nothing at all to do with it only to sell it for her, or she will sell it when the price gets right.

Q. You handle all of these assets for her, such as advertising it, discussing it with the prospects, discussing and arranging to have it planted and harvested, is that right?

A. Yes, I do. [120]

Q. Who made the arrangements to store the grain at the Hayden Flour Mills?

A. Well, I have arrangements there all the time to store grain. They always store my grain, whether

(Testimony of Thomas J. Hughes.)

it is wheat or barley or what it is. I never make settlement for that probably for—well, next year, after it is thrashed.

Q. Do you, Mr. Hughes, have at the Hayden Flour Mill at the present time your own cutting of barley?

A. I have some 1,200 sacks of barley down there that was cut at the home ranch. It is in sacks. The barley that come from this 40 acres is in bulk.

Q. You are better off financially than you were before you got arthritis, aren't you?

A. Well, I'd be better off if I would have this judgment, this money I am suing for.

Q. The question is, Mr. Hughes, you are better off financially than you were before you got arthritis?

Mr. Laney: Just a minute, I object as irrelevant and immaterial.

The Court: Oh, I think it is, but he may answer.

A. Now?

The Court: Yes. A. Well, I expect so.

Mr. Hull: Q. Where is the milk sold from the [121] ranch?

A. The Borden Creamery Company.

Q. At Tempe? A. Yes.

Q. That is a condensed milk plant over there at Tempe?

A. I don't know what they do with it now. They had a condensed plant there at one time.

Q. How long has the milk from your ranch been sold to Borden's at Tempe?

A. Well, the Borden Creamery have come in there later on, but ever since I sent any milk to the creamery at all it has gone to the creamery.

(Testimony of Thomas J. Hughes.)

Q. What do you receive by way of income from the sale of the milk per month?

A. When do you mean?

Q. Let's take it right now, right in this season of the year.

A. This season of the year the milk—there isn't quite so much milk, the pasture has not been so very good and probably it would run, probably eight or nine hundred dollars.

Q. A month?

A. Yes, maybe a little more, maybe a little less.

Q. Would it average, say, a thousand dollars a month over the year? [122]

A. Well, it might from now on, but I rather doubt the other part of the year whether it would or not.

Q. Well, how much do you receive from the sale of milk during the best months on your milk?

A. Well, around a thousand dollars.

Q. Around a thousand dollars? A. Yes.

Q. So it is around between nine hundred and a thousand all the time?

A. Well, I think somewhere about there.

Q. Was that true in the year '41?

A. Well, I think the year '41, I think it is a whole lot less. I don't think it is over \$350 or \$400. The price of milk was awfully low.

Q. Are you selling more milk today than you were in '41, gallons?

A. Well, there is more of it, yes, and then the price is quite a good deal different, probably a dollar, and on seven or eight cent butterfat.

(Testimony of Thomas J. Hughes.)

Q. Now, you go over to the Borden plant a couple of times a month to receive your checks for the milk, don't you?

A. I have not been to the Borden plant any time in the last two or three years to receive checks.

Q. Do you remember Mr. V. A. Vogel, who is the [123] superintendent over there?

A. Yes, I know Vogel.

Q. He was superintendent until '43?

A. Yes, I know him very well.

Q. Did you go over there then and pick up your milk checks while he was there?

A. I did at times, I went over there with the milker that was milking cows. I used to drive down there once in a while with him and they had a hot shower there. I used to go in there and to get relief from the arthritis, turn the hot water on.

Q. You also picked up your milk checks on those occasions?

A. Well, if he was there I would. Sometimes they would send it out, but this last company have always sent it out. You never have to go get it.

Q. Do you know the superintendent over there now?

A. Yes, I do.

Q. Mr. Hollingshead?

A. Yes.

Q. You would discuss dairy problems with him from time to time, didn't you?

A. The only thing I discussed with him very much is the sending us out of a milker if he could [124] find a good man.

Q. Have you discussed with him such matters as prices on milk?

(Testimony of Thomas J. Hughes.)

A. Well, not so very much, not that I remember of.

Q. Have you discussed with him matters of equipment, your milking machines and various related machines to the dairy industry?

A. Well, I don't remember of discussing those with him, those things with him. He sends their man out there occasionally when the milk is not very clean, and makes an inspection of the milk and the milk house and all, and that fellow's name is Mr. Cain. He is the field man.

Q. You talked to Mr. Cain about those problems?

A. No, he talks to the man that milks.

Q. How does it come to your attention; does that man that does the milking report it to you?

A. How is that?

Q. How does it come to your attention; does that to your attention? He tells you about this complaint?

A. The Borden Creamery Company sent out a notice on the can when it is bad milk, or unclean. Sometimes they call up at the house and tell my wife about it, and sometimes if I am there, I answer [125] the phone and they will tell me, and I told them to send out the field man and see what is wrong, so they send him out occasionally to inspect it.

Q. Is anything done by you with reference to satisfying their complaint?

A. Well, he shows them what is wrong. Sometimes they don't put enough pads in the strainers and the milk is not so good.

Q. Who sells your grain, your barley and your alfalfa, who actually sells that?

(Testimony of Thomas J. Hughes.)

A. Well, I sell it when it is sold.

Q. Do you sell to the Tovrea Land & Cattle Company, don't you? A. Sell what?

Q. Sell grain to the Tovrea Land & Cattle Company? A. Tovrea Land & Cattle Company?

Q. Yes.

A. I never sold anything to the Tovrea Land & Cattle Company, I sold stuff to the Tovrea Packing Company.

Q. Maybe I am mixed up on it. When was this sold to the Tovrea Packing Company?

A. I don't remember, some time back. We haven't sold them hay for the last couple of years to the Packing Company. I don't just remember what time [126] it was, some time back, though.

Q. Do you recall how long back it was?

A. No, I don't just remember offhand. I can look up the records for you if you want it.

Q. Back in '46 you were selling hay and grain to the Tovrea Company, weren't you?

A. In '46?

Q. Yes, back in May, '46?

A. Well, I can't tell you whether I was or not. I don't remember, but I sell them hay and I sell them barley, sometimes both.

Q. And sometimes you sell them cows, don't you? A. Yes.

Q. And bulls? A. Yes.

Q. And steers? A. Yes.

Q. Do you have any horses or any mules on the ranch?

(Testimony of Thomas J. Hughes.)

A. We have got a horse that they use for bringing the cows in, and then we got a couple of mules that are pretty old mules, and have a Palomino mare there, a young one.

Q. Now, in addition to these sales that you make to the Tovrea people, do you, yourself, sell some products to the Hayden Flour Mills; do you [127] make any sales to the Hayden Flour Mills?

A. The Hayden Flour Mills never buy any hay.

Q. Well, do they buy any barley?

A. Yes, I sell them barley.

Q. And is that true over the past five or six years that you have been doing that?

A. Well, I haven't been selling them it all, because I sold some to the Tovrea.

Q. Where do you buy your seed?

A. Seed?

Q. Yes. A. I use my own seed.

Q. Do you ever buy seed from the Hayden Flour Mills?

A. I always have seed stored there. I use my own seed, and they charge me so much for recleaning it.

Q. Who makes those arrangements with the Hayden Flour Mills? Do you, yourself, do that, Mr. Hughes?

A. I just call them up and tell them to send me out so many sacks of seed to plant, and they send them out.

Q. Do you have with you a copy of your account with the Tovrea Company over the past few years?

(Testimony of Thomas J. Hughes.)

A. No, I haven't.

Q. Do you have with you a copy of your account with the Borden's, or a copy of your account with the Hayden Flour Mills?

A. Copy of the account in what way, one month or what?

Q. Let me ask you this: In March, 1948, didn't you go to the Hayden Flour Mill and spend two or three hours in going over your account with them and making a complete record of what you found on their books?

A. The last time I was down there I went down and made settlement with them for some grain I sold.

Q. Do you know when that was?

A. No, I don't remember when it was. I think it was the last time I was there, but I am not sure.

Q. Do you recall going down there in March of this year and going over the books?

A. No, I can't tell you whether it is March or not. I don't know.

Q. Do you recall going down——

A. Yes, I went down there but I don't know when it was.

Q. Did you make any written copy of what you found in those books there?

A. They made me a statement and I don't know just where that statement is. It is at home some [129] place.

Q. Now, did you yourself go over and check your account with the Borden Plant?

(Testimony of Thomas J. Hughes.)

A. No, I didn't go over there at all. I haven't been to the Borden Plant for quite awhile. They send out a statement every two weeks with a check in it.

Q. What I meant is you always check that for accuracy yourself, you go over the account, don't you?

A. I haven't been checking it at all. I just get a statement, look at it and take the check and deposit it.

Q. Does anyone besides yourself have authority to sign checks on the checking account in the First National Bank of Tempe?

A. My wife signs checks there.

Q. But she does not sign on the Valley Bank in Phoenix, is that right? A. No.

Q. Now, your wife has rheumatism, hasn't she?

A. Well, she has had, but she has kind of bunions on her feet that bothers her.

Q. She is not very active in getting around physically?

A. Well, I think she is more active now than I am.

Q. Well, does she make the deposits in either of those accounts at either bank at the time the deposits are made?

A. No, I think I make them deposits myself mostly.

Q. Does she make any withdrawals; does she sign any checks on the other account at Tempe?

A. Does she sign any checks?

Q. Yes. A. Yes, sure.

(Testimony of Thomas J. Hughes.)

Q. She does?

A. Yes. If she wants any money, why, she just writes out a check against it. If she wants to pay anybody, why, pay them.

Q. Who pays the household bills out there at the ranch?

A. Oh, she does sometimes, sometimes I pay it.

Q. Do you have with you your cancelled checks for—on either account, in response to the subpoena that has been served on you?

A. Yes, the checks is all here.

Mr. Hull: May I see them, please?

(The documents were presented to Mr. Hull.)

Q. Do you know how many years this covers?

A. Yes, I do. It covers what the Court asked for.

Mr. Laney: The subpoena, you mean.

Mr. Hull: July 1st, 1941.

A. All right, you got them there.

Q. Are these arranged by years, do you know?

A. Yes, they are, month by month, if you will keep them separate. If you keep them separate—if you want to look at them, don't get them all mixed up.

Q. I would like them numbered—I would like to have them identified by years or some way so I can facilitate the inspection of them without messing them up.

A. Why don't you take the year '41, from July, '41, for the rest of the year?

Q. Have you had occasion to go over these

(Testimony of Thomas J. Hughes.)

checks since the subpoena was served on you to produce them? I mean have you looked them over during the last few days or the last week or two?

A. The only time I looked them over, when I opened them, was to get out these checks that I paid your Insurance Company. I went to each bundle of checks where I knew that check would be, and I got it and that statement there with the checks, that check will be missing, see?

Mr. Hull: Now, if the Court please, it is [132] about time to adjourn. I'd like for the purpose of facilitating this examination to look these over without bothering the Court and the jury with it, and I would like to have them marked some way for identification so I might have the privilege of looking at them in case we want to use them, if it is agreeable with counsel that I may use them without marking them for identification.

The Witness: Well, you got——

Mr. Laney: Just a minute, this is something to be settled between lawyers.

The Witness: All right.

Mr. Laney: It is all right with us for the Clerk to put a tag on it and mark it for identification and there it will be.

(Thereupon the documents were marked as Defendant's Exhibit B for identification.)

Mr. Hull: How about the suitcase?

The Witness: Put them all in the suitcase and keep the whole business, but don't lose it.

The Court: We will suspend at this time until ten in the morning. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 4:55 o'clock p.m. of the same day.) [133]

10:00 o'Clock A.M., October 14th, 1948

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

THOMAS J. HUGHES

resumed the witness stand and testified further as follows:

Cross-Examination (Continued)

Mr. Hull:

Q. How old are you, Mr. Hughes?

A. I am 72.

Q. 72? A. Yes.

Q. Do you keep a record, a written record of the financial transactions out there at the ranch?

A. I keep a record, yes, of the sales and the money that is taken in for those sales.

Q. Are the entries made in your handwriting?

A. Yes, they are.

Q. What items or entries do you make in there? I am referring now to such things as sales. Do you also keep in there the amounts you pay for ranch repairs or for cutting hay or threshing hay or any of those services? [134]

A. Well, in that record is kept all of the different items of that kind, the amount of money

(Testimony of Thomas J. Hughes.)

that is spent for repairs for machinery and also for labor and different things.

Q. Have you done that each year for the years '42 through to the present time, we will say, have you kept that record right up to date?

A. Well, no, this year isn't up to date.

Q. This year is not up to date? A. No.

Q. But with the exception of this year, or, we will say, to the first of '48, it is up to date, is that correct?

A. Yes, they are all up to date, yes.

Q. Do you have that here, Mr. Hughes?

A. Yes, I have.

Q. I want to show you a book, a covered book marked "Record," which is Defendant's B-1, Mr. Clerk.

The Clerk: Yes, that is a part of "B," so that will be the first one.

Mr. Laney: Would counsel mind marking it separately, then?

Mr. Hull: I think it is to be marked separately.

(Thereupon the document was marked as Defendant's Exhibit B-1 for identification.) [135]

Q. (By Mr. Hull): I want to hand you B-1, a record book, and ask you if that is the book which you referred to, would you just look at it, please, and tell me whether the entries are all made in your handwriting?

A. If they are all made? I am sure they are, because I made all of those records—well, not all of those, there is some Mr. Haroldson made.

(Testimony of Thomas J. Hughes.)

Q. Mr. Haroldson is the man that makes out your income tax statements? A. Yes, sir.

Q. I presume that anything in here that represents the income tax would be made by him, is that correct? A. Yes, and any corrections.

Q. Most of the entries are made in your handwriting? A. Yes, they are.

Q. Did you bring with you in response to the subpoena, Mr. Hughes, a record of the milk sales to the Borden Company at Tempe for the period some time in '41 up to some time in '48, which was designated in the subpoena?

A. I don't have the bills, but I have in that book of records the amounts of sales of milk each year.

Q. Those are all reflected in there?

A. Yes.

Q. I would like to show you Defendant's Exhibit B-2 for identification, which consists of a number of entries made upon the slips headed "The Borden Company, Tempe, Arizona," and I will ask you if those are your records?

A. These are statements that is sent out by the Borden Company, and at the end of the year when we make up the tax, income tax report, we figure all of these up for each year and enter it on that record there of so much milk sales. I think you got a part of one year and a part of another in there.

Q. If you will examine them I think you will find there are no entries except for '47 and '48.

A. Well, the '48 has not been entered at all.

Q. I think there are one or two '48 slips in there.

(Testimony of Thomas J. Hughes.)

A. Whatever for '48 in here has not been entered at all. '47 has all been entered in the book of record.

Q. Mr. Hughes, these are all of the slips of this character that you have for the years involved that I asked about, that is correct, is that right?

A. For the year, yes. [137]

Q. Some in '41?

A. Oh, no, there are some more of them, I don't know where they are.

Q. You could not find them?

A. No. The only thing I have a complete record of sales on that milk is in that record book.

Q. Surely, but I mean you could not find any others?

A. I didn't find any. I looked there where I keep some other papers and I couldn't find it. Now, this '47, these are all together for the year.

Q. These are all in there?

A. Well, whatever—this much on the '48. There may be some short. I couldn't tell you.

Q. I see, but you don't have any for '46, '45?

A. No.

Q. '44, '43, '42 or '41?

A. I don't think I have, but I have a complete record of the sales of milk for that year.

Q. That is in that record, I believe you told us?

A. Yes, it is.

Q. Now, Mr. Hughes, in the operation of your irrigated land it is necessary to pay for water, any excess water for the irrigation of the land, isn't that true? [138]

A. Yes, it is.

(Testimony of Thomas J. Hughes.)

Q. Now, who pays for the water to the Salt River Valley Water Users' Association?

A. I pay the water assessments, but the excess water on land that is leased is paid by the party that has it leased. Any excess water that I use on the other portions of the land, I pay for.

Q. Now, I want to show you a series of checks drawn on the First National Bank of Arizona, or, rather, the First National Bank—yes, the First National Bank of Arizona, the Valley National Bank, those two banks, all drawn payable to the Salt River Valley Water Users' Association and marked Defendant's Exhibit B-3 for identification, and I will ask you if your signature appears on those checks, please, sir (handing documents to the witness)?

A. My signature is on every one of those.

Q. Do you recall any instance, Mr. Hughes, when a check is made payable to the Water Users' Association for water, that anyone other than yourself paid for it, for water on the irrigated lands?

A. I paid for all but the excess water on the land that is leased.

Q. Now, Mr. Hughes, I believe you told us yesterday that you, yourself, made all of the [139] deposits in the Valley National Bank, which was your sole account, and in the First National Bank of Arizona at Tempe, which was the joint account with your wife, is that right?

A. Well, I think on the Valley Bank that at different times there was money deposited over there for me that I didn't personally make myself. Now,

(Testimony of Thomas J. Hughes.)

it might have been the Hayden Flour Mills or it might have been somebody else.

Q. I want to show you a list of deposit slips marked B-4 Exhibit for identification, for the First National Bank and the Valley Bank, and I will ask you if those bear your signature, please?

A. (Looking over documents): There is no signature on this slip that carries mine.

Q. I see. With the exception of those three that do not bear any signature at all, will you state whether or not your signature appears on all of those that are signed?

A. That is my signature on all of them but those three, and has no signature at all.

Q. Thank you. Now, Mr. Hughes, who pays the taxes? A. I do.

Q. On the land, you pay them?

A. Yes, I do. [140]

Q. And you pay these by checks drawn on the banks that we have referred to in the testimony?

A. Well, it is either one bank or the other, I don't know what bank, but sometimes one bank and sometimes the other.

Q. I'd like to show you a series of checks drawn payable on those banks marked Defendant's Exhibit B-5 for identification, and I will ask you if those represent tax payments by you?

A. My signature is on all of those checks. I say that is my signature on all of them.

Q. They represent tax payments?

A. Yes, they do. There is one there I kind of

(Testimony of Thomas J. Hughes.)

rather doubt about, I kind of doubt what it is. It is a small amount.

Q. Would you like to examine it again?

A. No, that is all right, let it go.

Q. Now, Mr. Hughes, I show you Defendant's B-6 for identification, purporting to be a check by you drawn payable to the Arizona Title Guarantee & Trust Company in the sum of \$3873.88, and will ask you if you can state just briefly what that represents.

A. What it represents?

Q. Yes.

A. It represents the purchase of a residence property that I am giving to my daughter out here in Windsor Square.

Q. I see. You are purchasing land for her?

A. I purchased that home for her. That is part payment.

Q. Now, Defendant's Exhibit B-7 for identification, purporting to be a check in the amount of \$1250, payable to Bert Cavanaugh, Realty. Will you tell us what that is?

A. Yes, that is on the same piece of property.

Q. That is the same transaction? A. Yes.

Q. Is that an escrow transaction with one of the Title Companies here?

A. It was, but it is out now, and I have the deed to it, the deed to my wife and I.

Q. I want to show you a check marked Defendant's Exhibit B-8 drawn to Pete Obregon it looks like and in the amount of \$162 purporting to be for baling hay. Did you write that check?

(Testimony of Thomas J. Hughes.)

A. Yes I did.

Q. Does it represent pay for hay baling?

A. Yes.

Q. On your ranch? A. Yes.

Q. And Defendant's Exhibit B-9, drawn payable [142] to Hobart Barbour, threshing and hauling, is that an expenditure made by you for the purpose indicated thereon?

A. This is the amount of money that was paid for threshing the barley on that 40 acres you asked me about yesterday.

Q. I see.

A. This one, \$282, and the hauling is included in the threshing.

Q. Thank you, and Defendant's Exhibit B-10, a check payable to Palmer Welding, \$473, marked "threshing grain and hauling." Can you tell us what that is?

A. This is for threshing and hauling on the home ranch where I live, 1200 sacks or more of barley.

Q. And the check here, I can't make out the name of the payee, \$153, marked "Baling 34 tons of hay," marked Exhibit B-11. Will you tell us what that is, please?

A. This is de la Cruz, is the fellow's name. This is for baling 34 tons of hay on the home ranch.

Q. On the home ranch? A. Yes.

Q. And Defendant's Exhibit B-12, drawn payable to the Valley National Bank in the sum of \$4021.11. [143] Will you tell us, please, briefly, what that is?

(Testimony of Thomas J. Hughes.)

A. This is in payment of a note that I owed the Valley National Bank and included—it was \$4000, and the interest is included, Twenty-one dollars and something.

Q. Then I take it you had, prior to February 5th, 1948, the date of this check, borrowed money from the Valley National Bank, is that right?

A. Oh, yes.

Q. How long did you do that, do you remember, just roughly? A. This one here?

Q. Oh, just approximately.

A. Well, I don't just remember.

Q. Did you from time to time during the years '42 to '48 borrow money from the Valley Bank?

A. Yes, but I don't know just what dates or how far back.

Q. Surely, but did you sign loan applications for these particular loans?

A. Yes, and I had my wife sign one of them. I don't remember the date I signed it.

Q. If she signed—she signed them and you signed them all, did you not?

A. I signed them all, yes, but I think she signed them with me on the application, or something, [144] that they sent and I mailed it back to them.

Q. Did you borrow any money from the First National Bank of Tempe during those years?

A. Commencing what year?

Q. Well, commencing, say, with July, '41, and going right on up to the date of this check, say, February, 1948?

(Testimony of Thomas J. Hughes.)

A. Well, I couldn't say positively about that, but I don't think that I borrowed any money from the bank in Tempe for a good many years.

Q. When the loans were paid off, did you make payments to the Valley Bank in payment of those different loans as, for instance——

A. The other loan?

Q. Yes. A. Yes, I paid it.

Q. Now, I want to show you B-13, a check drawn to the Concrete Conduit Company, \$546. Can you tell us what that is, please?

A. Yes, this is for these concrete headgates that you put on the ranch to let the water through on the different lands.

Q. By the irrigation ditches? A. Yes.

Q. And showing you Defendant's Exhibit B-14 for identification, drawn payable to the Phoenix Motor Company, \$1214. Will you tell us what that is, please?

A. This is a check given to the Phoenix Motor Company for a new Buick automobile that I gave to my son, the one that is a doctor that just come back from the Army. This is a part of it. The Valley Bank has the other check.

Q. Well, then, on October 10th, 1947, you did buy an automobile, is that correct, a new Buick?

A. For my son.

Q. I am referring to B-14, in case I haven't identified it. I hand you Defendant's Exhibit B-15, a check payable to the O'Malley Lumber Company,

(Testimony of Thomas J. Hughes.)

in the amount of \$17.95, and indicated for supplies. Can you tell us what that is, please?

A. Well, I think it is this—I might be wrong about it, but I think it is this tampoon canvas that we use in the irrigating ditches.

Q. When supplies are purchased for the ranch out there you make those purchases yourself, is that correct?

A. Well, I'd go for them sometimes if I go down. If they want it, if they need any supplies like that, why, sometimes I'd send down there, the milker would go and get it sometimes and later I would pay for them. This check is in payment of [146] a bill that I owed there.

Q. Do you also deal with the Stapley Company in the matter of supplies for your farm?

A. Oh, yes.

Q. I want to show you Defendant's Exhibit B-16 for identification, marked payable—well, I can't read the name of the payee, dated July 12th, 1947, and indicated for "baling." Can you tell us what that is, please?

A. This is a check given to the same party that we gave some time ago for baling hay. That is Alvin de la Cruz.

Q. Was he working for you?

A. No, he owns his own baler.

Q. Did you contract with him to bale in '47?

A. Well, he has been baling for us for the last summer, and I know he baled for us in '47.

Q. Did you have a written contract on that?

(Testimony of Thomas J. Hughes.)

A. No, we didn't.

Q. He has baled for you a number of years, is that correct? A. Yes, different times.

Q. Now, I want to show you Defendant's Exhibit B-17, a check drawn to someone whose name I can't distinguish, indicating for "storing hay." Can you tell us what that is, please, sir? [147]

A. This is for hauling hay out of the field and storing it over on the ranch for the use of dairy cows.

Q. And now, Defendant's B-18, payable to John P. Joyce and marked "repairs tractor." Can you tell us what that is, please?

A. Well, that is supplies that John brought over for me and he paid cash for the stuff, and this is a check to reimburse him for it.

Q. Was it for the repair of the tractor that is used on your ranch? A. Yes, sir; it was.

Q. And Defendant's Exhibit B-19, payable to John Ramirez, \$57, indicated for storing hay in '47. Will you tell us what that is, please?

A. Well, this is for storing hay to bale on the ranch and store over there for the use of dairy cows.

Q. And Defendant's Exhibit B-20, payable to Mr. Perez, marked "hauling barley" in '47. Can you tell us what that is?

A. This is for the same kind of work, storing hay over at the farm.

Q. Now, B-21, payable to somebody by the name of Kleck, I believe, \$304 for—I can't read that.

A. This represents the cost of putting that [148]

(Testimony of Thomas J. Hughes.)

land, that 40 acres and preparing it to plant barley.

Q. That you did for your sister?

A. Yes, that is what it is for.

Q. Now, look at Defendant's Exhibit B-22, drawn to the Valley National Bank in the amount of \$4536, March 4th, 1947. Will you tell us what that is, please?

A. Well, that is a note for \$4500, and the \$36 added to it there is interest.

Q. Was that in payment of one of the loans that you told us about awhile ago?

A. Yes, it was. There is interest of \$36 and principal of \$4500.

Q. In other words, that represents the payment of that loan that you secured from that bank?

A. Yes.

Q. Now, would you look at Defendant's Exhibit B-23, drawn payable to Harold Y. Heiskell, and marked "milking machine repair," and state what that is, please?

A. Well, this is parts for the milking machines from the Surge Company that we purchased for the dairy.

Mr. Laney: May I see that?

Mr. Hull: Surely. That is for your dairy? [149]

A. For the cows, yes.

Q. Defendant's Exhibit B-24, drawn payable to the Valley National Bank, Customer's Securities Department, in the amount of \$22,000. Will you tell us what that is, please?

A. That is the purchase of Government G Bonds.

Q. You made this purchase, did you?

(Testimony of Thomas J. Hughes.)

A. I did.

Q. Did you purchase those bonds out of the income that you had received from the operation of the ranch and the dairy?

A. I think I will have to look it up to be sure.

Q. Now, Defendant's Exhibit B-25, drawn payable to Charles Saylor, in '46, \$497, marked "baling hay." Can you tell us what that is, please?

A. Yes, that is for baling hay.

Q. How many tons does that cover?

A. 142 tons.

Q. Defendant's Exhibit B-26, drawn payable to the Hayden Flour Mills, December 20th, 1946, in the amount of \$3030.56. Will you please tell us what that represents?

A. That is in payment of some wheat that I got from them.

Q. You purchased wheat then, in '46 from the Hayden Flour Mills? [150]

A. Well, that was some wheat—I paid them for that wheat. They loaned me that wheat until mine was threshed.

Q. Did you need this wheat for some particular purpose?

A. Well, it was sent over to my step-son over in California.

Q. Did you have arrangement with him to supply him with wheat at a certain time?

A. No, other than just they were awfully short on wheat and he was over here and wanted wheat, and I told him to just borrow it from the mill and then pay them back.

(Testimony of Thomas J. Hughes.)

Q. You were ultimately paid for the wheat, were you not? A. Huh?

Q. You were ultimately paid for the wheat that is represented by that? A. Oh, yes.

Q. Look at B-27, drawn payable to Sam De Priest, in 1946, \$31.20, marked "sub-soiling," or something of that nature. Will you tell me what that is, please?

A. This is contract work on sub-soiling on the ranch.

Q. Sub-soiling? [151]

A. Yes. I think there is another one there, a larger check. I think that is the final payment. I am not sure. I think there has been more than that.

Q. What do you mean, just briefly, by sub-soiling, please?

A. Well, in preparing land so it will take water good, some hard land and they use a sub-soiler. Well, it has got long hooks, shanks on it, and goes down in the ground 18 to 20 inches to loosen the land up.

Q. How often do you do that out on the ranch?

A. Well, it is not done so very often. It depends on what type of land it is. If it is sandy land it would not need it very much, but if it is adobe land and awful hard, it requires it more often.

Q. Have you had occasion to do any of that sub-soiling work anywhere on that ranch since November 20th, 1946? A. '46?

Q. Yes.

A. I don't think so. I am not positive of that, however.

(Testimony of Thomas J. Hughes.)

Q. Here is a check marked B-28, to Pete Obregon, marked "baling hay," in 1946. Will you state what [152] that is, please?

A. That is for baling hay that we use on the ranch there for the dairy cows.

Q. For the dairy cows?

A. I think so. It is stored on the ranch for the use of the dairy cows.

Q. Now, here is a check marked for identification as B-29, payable to Roy Painter, and marked "one bull." Will you state what that is, please?

A. Yes, that is a registered bull that I bought from Mr. Painter.

Q. In '46?

A. Well, whatever the date there is.

Q. Mr. Painter lived near you?

A. Well, a few—not so very far, about two or three miles.

Q. Is he the same Mr. Painter that has currently served on the Board in the Rural School District No. 13 with you?

A. Yes, it is.

Q. The same man. I'd like to show you B-30, payable to Mr. De Priest, marked "plowing and sub-soiling," November 8th, 1946, and ask you what that is.

A. Well, this is the one that I told you about awhile ago. There is more of that sub-soiling and that is the same thing, I think. Well, it is marked here, "plowing and dragging and sub-soiling."

A. Well, you made those remarks on there, didn't you, Mr. Hughes?

A. Yes, I made all of them.

(Testimony of Thomas J. Hughes.)

Q. That was the exhibit I referred to as B-30, in case I didn't identify it. Now, B-31, drawn payable to Harold Y. Heiskell, in '46, in the amount of \$78.12, marked, "dairy expense." Will you tell us what that is, please?

A. Well, I think that is for—I think that is in payment of a trade I made with him. I turned in some old machines, I think that is it. I am not positive, but anyway that is dairy supplies.

Q. That is the dairy on which you have 60 or so cows on the ranch?

A. That is correct, yes.

Q. Defendant's Exhibit B-32 is marked payable to O. S. Stapley and Company in the amount of \$100, marked as payment on some disc, I believe it is. Will you please tell us about that?

A. Yes, that is the payment of a border disc. We could not get it at the time and they wanted a payment down on that, so I made the payment.

Q. You bought a border disker then, did you, in January, '46? [154]

A. Yes.

Q. Now, here is one that is marked B-33 for identification, January 14th, 1946, in the amount of \$1800, drawn on the Collector of Internal Revenue, and indicated "on estimate, 1946 income tax." Would you tell us what that is, please?

A. That is on the estate.

Q. What does that mean?

A. That is not "estimate."

Q. Oh, I see. Very well. It is "est" and I misinterpreted it. Will you look at Defendant's B-34,

(Testimony of Thomas J. Hughes.)

drawn payable to A. J. Schlessinger in the amount of \$1000, December 29th, '45. Will you tell us what that is, please?

A. Yes, that is for the preparation of land. That was all plowed up, subsoiled. It does not state here exactly what that was, but it was sub-soiled and disked and put it up in shape to plant.

Q. Who was this man Schlessinger?

A. Well, he is the fellow that lives in Chandler and he does contract work and a tillage company.

Q. In '45 you had him prepare the home ranch, is that right?

A. No, that is the ranch west of where I live.

Q. Well, did you tell us about that ranch yet; [155] I mean have we talked about that ranch at all, this ranch west of where you live?

A. Well, it isn't the home ranch. The home ranch is the other quarter.

Q. I mean is it a part of the 160 acres that you operate as a unit?

A. I think you got it wrong. It is 160 acres, what they call the old Blake Ranch that is just west of where I live. Where I live is the home ranch and there is about 70 some odd acres on the home ranch where I live. This work was done on the Blake ranch, out on the Northwest Quarter of Section 26.

Q. This is the ranch land that you paid taxes on?

A. Oh, yes.

Q. Defendant's Exhibit B-35, November 6th, 1945, drawn payable to the Hayden Flour Mills in the amount of \$1,142, marked "Alfalfa seed." Will you tell us what that is?

(Testimony of Thomas J. Hughes.)

A. Well, that is what it is for. It is for to plant alfalfa seed on this land that they prepared.

Q. Mr. Hughes, maybe I misunderstood you yesterday. Didn't you tell us yesterday you did not buy seed, you raised your own seed? [156]

A. You was talking about barley.

Q. Oh, I see.

A. I don't raise any alfalfa seed.

Q. Now, B-36, drawn payable to the Western Union, August 28th, 1945, in the amount of \$201.73. Will you tell us what that is?

A. I think that this is money that I wired my son.

Q. I see. Very well.

A. I could find out exactly if you want to know, but I am pretty sure that is what it is.

Q. It does not represent anything at the ranch, then?

A. No.

Q. I will show you Defendant's Exhibit B-37, drawn payable to this man Schlessinger again in the amount of \$300, and marked "threshing," I believe. Will you tell us what that is, please?

A. That is something like subsoiling, but some of them call it chiseling. Now, this is work that he done in addition to the thousand dollars over there.

Q. On your ranch?

A. Yes, and where we plant that alfalfa.

Q. This is the man at Chandler that you hired to do that? [157]

A. That is right.

Q. B-38, marked payable to Mr. De Priest in

(Testimony of Thomas J. Hughes.)

the amount of \$120 and marked "Disking" something. Will you tell us what that is, please?

A. Well, now, this is disking land in preparation for, well, some of them disk it to plant grain and some of them plow it and disk it and drag it. This is probably double disked, I take it. If it is double disked, then it is a little cheaper than it is to plow and drag it.

Q. On June 9th you did have this man, Mr. De Priest, double disk that land? A. Yes.

Q. Will you look, please, at Defendant's Exhibit B-39, and drawn payable to the Palmer Manufacturing Company—Corporation—in the amount of \$110. Do you know what that is, please, sir? I have just a few more, your Honor.

A. That is for a cooler that I gave to my daughter to put in her home up here.

Q. Where is her home?

A. 1300 West Adams.

Q. Do you own the land?

A. Well, it is in my name, but I gave her the property. There is a home there.

Q. But the deed is in your name? [158]

A. Well, it is yet, but we gave it to her, my wife and I, and then she wanted to change, probably resell it, and she is going to take this new home that we bought out at Windsor Square.

Q. What will you do with this particular property?

A. Well, we will sell that property or lease it, or something.

(Testimony of Thomas J. Hughes.)

Q. Will you look at Defendant's Exhibit B-40, drawn payable to Fred Hannon and Sons, marked "threshing grain" in the amount of \$635, in '43, and tell us what that is?

A. Yes, Fred done some threshing for me, threshed grain. I don't remember whether that is barley or wheat, but it is one of the two.

Q. That was on the home ranch, I mean the ranch near Tempe?

A. Well, it is either—that is '43?

Q. June 30th, 1943.

A. I think that is probably on one of the other ranches besides the home ranch, but I am not positive, but it is for threshing grain anyway.

Q. Well, Defendant's B-41, drawn payable to W. A. Rogers, in 1944, amount \$132, marked "baling hay." Do you recall that?

A. Yes, I do. [159]

Q. What was that for, please?

A. Baling hay.

Q. And B-42, drawn payable to Quick Seed & Feed Company, August 30th, 1943, in the amount of \$119. What does that represent?

A. That represents milking machines, Surge Milking Machine.

Q. In other words, you purchased this back in '43, is that correct?

A. Yes, they were purchased back in '43.

Q. Those are used for the milk that goes to the Borden's Creamery?

A. Yes, they have a different concern. Heiskell

(Testimony of Thomas J. Hughes.)

handles it now. They took the agency away from the other people out there.

Q. B-43, marked payable to Arthur Rogers in '43 for \$444, "baling hay." Do you recall that?

A. Yes, that is correct.

Q. You recall that, do you?

A. Yes, I do.

Q. And B-44, Tony Roma, in '43, for \$16, to cement something. Will you tell us what that refers to, please?

A. Yes, that is for cementing the floor in the home where the foreman lives.

Q. And B-45, another check in '43 drawn payable [160] to Mr. Schlessinger for \$462. What does that represent, please?

A. Well, that represents tillage work there on the land.

Q. What do you mean by "tillage work"?

A. Well, preparing land, plowing it and breaking it and bordering it.

Q. Now, B-46, payable to W. A. Rogers in the amount of \$436, in 1943, for baling hay?

A. Yes, that is for baling hay.

Q. And B-47, to R. Medina, I believe it is, \$92, marked "hauling hay." Do you recall that?

A. Yes, that is Medina.

Q. Medina?

A. Yes, for storing hay on the ranch.

Q. Did he store hay on your ranch at that time?

A. Well, he either stored it or hauled it some place, but I think he stored it.

(Testimony of Thomas J. Hughes.)

Q. Defendant's B-48, May 21st, 1943, to Fred Harmon & Son, \$300, marked "threshing." Do you know what that is?

A. Yes, that is for threshing grain on the ranch there.

Q. Defendant's B-49, W. A. Rogers, in '43, \$623. Can you tell us what that is, please?

A. Yes, that is for baling hay. [161]

Q. B-50, payable to the First National Bank of Arizona, \$375 in '43. Will you tell us what that represents, please?

A. Well, that is a Government bond.

Q. You purchased the bond? A. Yes.

Q. Was that one of the bonds that you were giving to your children? A. Giving to what?

Q. To one of your children; were you giving this bond to one of your children?

A. I think so. I think that is the \$500 bond, 375, I believe, was the price of that.

Q. Now, B-51, payable to P. Fernandez, in '43, \$29, marked "hauling lettuce." Will you please tell us what that is?

A. Well, I think this is some lettuce that we got from some of the lettuce people for feed for the cows. The Mexican people haul it sometimes in their own truck and we pay them so much a load for hauling, but that is what it is.

Q. That is for the cattle that you have on the ranch? A. Yes, it is.

Q. B-52, February 16th, 1943, to the Quick Seed

(Testimony of Thomas J. Hughes.)

& Feed Company, \$100. What is that, please, [162] sir?

A. Well, this is for another machine I think that we purchased there.

Q. Another milking machine?

A. I believe it is. There is nothing else that we got from them only milking machines.

Q. Did you arrange with this Quick Seed & Feed Company to service these milkers from time to time, come out to the ranch and service them?

A. When they put them in, when we bought them, why they agreed to service them occasionally and put them in shape.

Q. What I mean, Mr. Hughes, is did you, from time to time after they were installed, request that their representatives come out and service these machines for you?

A. Well, I think—yes, I think so.

Q. Now, B-53, payable to A. Austin, I believe, marked "hauling hay," in '42. Do you recall that?

A. Yes, I do.

Q. Does it represent hauling hay on the ranch?

A. Yes.

Q. Here also in 1942 a check marked B-54, payable to Smith & Williams, in the amount of \$112.50. Can you tell me what that is, please, sir?

A. I had a man working for me by the name of Collins, and this was money that I put up for him that he bought an automobile. Smith & Williams was the name of the firm.

Q. That was back in '42?

A. Yes.

(Testimony of Thomas J. Hughes.)

Q. Now, Defendant's Exhibit B-55, drawn payable to the Quick Feed & Seed Company in 1942 in the amount of \$150. Is that also for a milking machine?

A. I am pretty sure that it was. I don't know if it was for alfalfa seed.

Q. What was that other check for?

A. I don't recall.

Q. What was the amount of that one?

A. The last one? I could find it for you.

Mr. Laney: The last was \$100.

Mr. Hull: That is right, \$100, February 16th, '43.

A. Well, I think it was for machines. I think another machine was purchased from them.

Q. So you purchased another machine about October 13th, 1942?

A. It must be, because we didn't buy any supplies from them.

Q. Also in '42 was a check drawn to this man Schlessinger, marked B-56. Was that also for preparing land? [164]

A. Yes, it was.

Q. Here is another one, B-57, drawn payable to this same man Schlessinger in the amount of \$212.50 in '42. Was that also for preparing the land?

A. Yes, that is the same.

Q. Of course, when I say "preparing the land," I mean, preparing it for **production**.

A. Yes, tillage work.

Q. Will you look at B-58, drawn payable to the Maricopa Tractor Company, September 16th, 1942,

(Testimony of Thomas J. Hughes.)

in the amount of \$3.47, and tell us, please, what that is.

A. That is some supplies for a Case Rake, teeth that go in the rake.

Q. That is equipment for a tractor?

A. No, it is for raking hay.

Q. Something you pull with a tractor?

A. Yes.

Q. B-59, payable to the State Tractor & Equipment Company, September 17th, 1942, in the amount of \$6.53. Do you recall what that is?

A. Yes, that is for some supplies for the John Deere disk that they had, that we had.

Q. That also was equipment on the ranch, is that correct, and B-60, August 22d, 1942, Ramon Bernall, \$165, "baling hay"?

A. Yes, that is right.

Q. That is correct? A. Yes.

Q. Do you remember Bernall, has he worked for you recently?

A. No, he has not, I haven't seen him for a long time.

Q. B-61, marked "Gililland's Water Company" in the amount of \$75, July 2d, 1942. Can you tell us what that is, please?

A. I think you are a poor reader.

Q. Maybe I am.

A. What does it say? It is Gililland's Motor Company.

Q. Gililland's Motor Company. A. \$75.

Q. You mean Gililland?

(Testimony of Thomas J. Hughes.)

A. Gililland Motor Company.

Q. You wrote it, didn't you?

A. Yes, I did. That is for repairing automobiles.

Q. That was for motor equipment that you were using on the ranch back in '42? A. Yes.

Q. Now, B-62, I think I can read this one, "Arizona Farmers Production Credit Association," in the amount of \$1031.81, and that is back in July of '42. Can you tell us what that is?

A. Yes, that is the payment of a note.

Q. That you borrowed money?

A. Yes, I did.

Q. Was that cattle or livestock loan or was it a real estate loan? Was it secured by anything?

A. It wasn't secured by nothing.

Q. B-63, July 9th, 1942, payable to Floyd Moore, in the amount of \$624, and refers to the Blake Ranch. Will you tell us what that is, please?

A. For threshing barley.

Q. Do you remember that barley was threshed back there on July 9th, 1942? A. I do.

Q. And June 20th, 1942, to Ramon Bernal, marked B-64, in the amount of \$388.75. What is that, please, sir?

A. That is for baling hay.

Q. And here is another one in '42 to this S. Medina, and it is marked B-65 for identification, marked "hauling hay."

A. That is right, that is hauling hay. It seems

(Testimony of Thomas J. Hughes.)

to me that he hauled a part of it, but that is for hauling hay, that is what it is.

Q. B-66, also '42, payable to William J. Read, in the amount of \$130, marked "final [167] payments on water. Maybe that is "motor," maybe you better look at it and tell me if you know what that is.

A. Did you say that is payment on water?

Q. It is either water or motor.

A. I think it is notes.

Q. I guess that is right. In other words, then, you did make final payment on some notes on June 16th, 1942?

A. Yes, final payment.

Q. Do you recall making the payment?

A. Yes, I do.

Q. Now, here is an instrument marked Defendant's Exhibit B-67 for identification carrying some figures on it. Can you just state briefly what that is, please?

Mr. Laney: Is that a check, please?

Mr. Hull: No, I don't know what it is, I am just asking him to identify it. It is a receipt, I think.

A. Well, this was a receipt. Haven't you got a check there for that same amount?

Q. Maybe so, I may have one but I don't intend to put in evidence all of your checks.

A. Well, you have a check that represents this——

Q. Well, what, briefly, does this represent? [168] Will you tell me, please?

(Testimony of Thomas J. Hughes.)

A. It is just a receipt for payment.

Q. Is this for payment of any note?

A. Yes.

Q. Now, Defendant's Exhibit B-68, July 18th, 1942, payable to the Valley National Bank in the amount of \$1015.83. What is that, please?

A. This is in payment of a note and the interest on it is \$15.83.

Q. And another one in '42, B-69, payable to the Valley National Bank in the amount of \$1025.83. What is that, please?

A. Note and interest of \$25.

Q. And May 14th, 1942, marked B-70, payable to Ramon Bernal, in the amount of \$377.

A. That is for baling hay.

Q. B-71, May 14th, 1942, payable to C. Mendez, in the amount of \$30.85. What is that, please, sir?

A. That is C. Mendez, 41 tons of hay. That is for hauling, \$30.85.

Q. I want to show you a document marked B-72 for identification, dated April 14th, 1942. Will you tell us briefly what that is, please, sir?

A. Well, that is a note to the Valley National Bank for \$1000 that I borrowed.

Q. That bears your signature on it, does it? [169]

A. Yes.

Q. That note has been paid, I believe?

A. Oh, yes.

Q. Now, B-73, miscellaneous debit slip, bank slip for the First National Bank, will you tell us what that is, in '42?

(Testimony of Thomas J. Hughes.)

A. Well, it says here, "Rental for one year on safe deposit box 123, receipt attached."

Q. Do you have a safe deposit box?

A. I have one in the Tempe bank.

Q. Is that in your name, your name only?

A. Yes, it is.

Q. Will you look, please, at B-74, and state what that is?

A. This is a thousand dollars—\$100 that was paid.

Mr. Laney: One hundred or a thousand?

A. One hundred. It was charged to my account and credited to Chris T. Martin's account. In other words, I asked them to do that for me and Mr. Haroldson made the charge, and he worked at the bank at the time, charged my account \$100 and credited Chris T. Martin of a hundred.

Q. (By Mr. Hull): Now, Mr. Hughes, you were duly appointed and qualified administrator of the estate of Mr. Martin, weren't you? [170]

A. Yes, I was.

Q. And I think you gave us the date yesterday, did you not, as to when you served in such capacity?

A. Well, I don't remember whether I did or not. I did——

Q. Let me ask you this: If, from March 20th, 1945, up to January 10th, 1947, you did not serve as administrator of the estate of Christopher T. Martin, deceased?

(Testimony of Thomas J. Hughes.)

A. Well, I couldn't tell you. I'd have to look up that record. I don't know.

Q. I don't want to cross you up on the dates, Mr. Hughes, but does that refresh your recollection as to whether or not somewhere during that period you did serve as administrator of that estate?

A. I served as administrator of the estate whenever it was, but I couldn't tell you just exactly the year.

Q. You were appointed by the Superior Court of Maricopa County for that purpose?

A. I was.

Q. During the administration of that estate, it became necessary for you to investigate certain mining claims and mining properties for the estate, didn't it? A. Yes, it was. [171]

Q. And you did make such an independent investigation?

A. Well, Mr. Scott, the attorney, made that investigation. I was laid up, I was pretty badly knocked out with arthritis and he went up to Globe and different places himself and made that investigation. I didn't go up.

Q. Now, Mr. Hughes, you asked the Superior Court to give you additional compensation above the compensation normally allowed for the administration of the estate, on your representation that you did extraordinary services in connection with the administration of the estate?

A. The attorney put that in there, Scott did. I

(Testimony of Thomas J. Hughes.)

don't recall just what it was, but he was the one that put it in.

Q. Would you recognize a statement of that account if I were to show it to you? I'd like to mark this for identification, please.

(The document was marked as Defendant's Exhibit C for identification.)

Mr. Hull: I might state that I want to show you what purports to be a certified, exemplified copy of the order settling administrator's first and final account decree of distribution in that estate certified to by the Superior Court of [172] Maricopa County, Arizona, and will ask you if you recall whether or not you made the representations therein appearing. Would you like to see it?

Mr. Laney: Oh, it doesn't matter.

Q. (By Mr. Hull): I will show you first of all in the certification, on the last page of the order settling the account, or, rather, on the last page of the final account, it is the second document in here, what purports to be verification before Edwin Green, a Notary Public, on the 10th of January, 1947. You just glance at it, briefly, and tell me whether you can identify that as a copy of the report that you made to the Court at the time you closed the estate?

A. Yes, I think this is correct.

Q. And you read the account, did you not, before it was filed, you read it? A. Yes, I did.

Q. And you signed it, did you not?

A. I did.

(Testimony of Thomas J. Hughes.)

Q. Do you recall making that representation in here to the effect, or rather, concerning the inventory and appraisal of the estate, delay in filing it?

A. You mean?

Q. I don't want to cross you up, I am just [173] asking you if you recall. If you don't, I won't bother you with it, Mr. Hughes.

A. Well, I remember it all right.

Q. Delay?

A. That is the inventory of the estate?

Q. Yes. A. Yes, it was made up.

Q. I mean do you recall anything that was said by you in the account with reference to any inventory that was filed late?

A. No, I don't.

Q. Now, do you recall whether or not you made any representations in here with regard to services which you performed in the administration of the estate; do you recall any of that?

A. Scott put it in. I don't remember what it was.

Q. You did read it and sign it and verify it, did you?

A. I think so, yes.

Q. Isn't it true that in addition to the compensation which the Superior Court normally allows to an administrator for the administration of an estate, you were paid an additional sum for extraordinary services in that particular estate?

A. Mr. Scott made—fixed those papers up. I don't know what he put in.

Q. You don't know what you got out of it, do you?

(Testimony of Thomas J. Hughes.)

A. Well, I remember him fixing all the papers up and having me to sign them.

Q. Now, I want to call your attention to Defendant's B-75, which is dated July 11th, 1941, a check drawn to Mr. Schlessinger in the amount of \$200. Is that also for the preparation of the land?

A. Yes, it is, because he didn't do anything else but that kind of work.

Q. So back as early, at least July 11th, 1941, you had dealings with him. Now, also, on July 9th, 1941, and I am referring to B-76, is a check drawn payable to the Hayden Flour Mills in the amount of \$500. What does that represent, please?

A. I think that is for alfalfa seed.

Q. For the ranch, wasn't it? A. Yes.

Q. Now, Mr. Hughes, in response to the subpoena from the Court you brought all of the checks that you had in either of these banks that were drawn on those banks from '41 through to the time designated in the subpoena. I could give you the exact date, if you want it. You did bring them all, didn't you? [175]

A. I brought all that the subpoena asked for.

Q. And they are all in this grip or handbag marked Defendant's Exhibit B for identification, that is true, isn't it, you brought them in?

A. Yes.

Q. And you have no other checks other than those that are in there for that period of time?

A. No.

Q. Did you bring with you in response to that

(Testimony of Thomas J. Hughes.)

subpoena the records of the Hayden Flour Mills showing what purchases or sales were made between you and the Hayden Flour Mills during this period of time?

A. No, I don't have that statement of the Hayden Flour Mills.

Q. You don't have any records?

A. I don't have them.

Q. What is the situation with regard to Tovrea, did you have an account or a statement you could bring in in response to the subpoena that would show what transactions were had between you and Tovreas during that period of time?

A. I could do it this way, that the Tovrea people bought cattle from me and they bought hay and they bought barley. Now, my record book shows the amount on that year. [176]

Q. I see, that will appear in that.

A. But the statements from Tovrea, I don't know where they are. They are probably around home some place, but I couldn't find them.

Q. You did look for them? A. Yes, I did.

Q. Now, Defendant's Exhibit B-77, an instrument on the letterhead of Fred G. Hilvert Company. That is signed by you, is it not?

A. Yes, this is the extension of the lease.

Q. That is the extension of the lease that you told us about yesterday? A. Yes.

Q. And B-78, purports to be a satisfaction of mortgage of record in this County, and bearing your signature. Can you tell us briefly what that is?

(Testimony of Thomas J. Hughes.)

A. Yes.

Q. What is it, please, sir? Is that what it is, a satisfaction of mortgage?

A. It is satisfaction of a mortgage that Christopher Martin had on some land I purchased.

Q. Had you been acquainted with Christopher T. Martin over a rather protracted period of time, a lengthy period of time, before he died?

A. Oh, yes.

Q. When did he die, do you recall? [177]

A. Well, I don't just exactly know when it was.

Q. Were you familiar with his affairs, his personal affairs, his property holdings, and so forth?

A. Well, other than the land I purchased from him. I didn't know much about anything about his mining claims.

Q. Will you please state briefly why you happened to apply for letters of administration to his estate?

A. Well, I owed the estate a couple of thousand dollars, and I spoke to Haroldson, or someone asked him or Ben Robbins, if they would not file letters of administration, and he said he would, but it just kept drifting along and going along, and I wanted to get it cleared up and pay the interest and get the loan cleared up, so Scott told me to just go ahead and file application on administration for it, so I done that and settled up the estate.

Q. Now, Mr. Hughes, who, if anyone, applies for insurance on the ranch properties; I mean your fire insurance and your liability insurance, whatever you may have out there?

(Testimony of Thomas J. Hughes.)

A. Well, Johnnie Joyce writes that. I don't know whether I sign the application for it or not, [178] but he writes all of that insurance policies.

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(Thereupon a short recess was taken, after which, all parties being present as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

THOMAS J. HUGHES

resumed the witness stand and testified further as follows:

Cross-Examination—(Resumed)

Mr. Hull:

Q. Mr. Hughes, in the Summer of '47 you took an automobile trip to Flagstaff, didn't you?

A. I think so.

Q. And you made the trip to Flagstaff in one day, didn't you?

A. Yes, we stayed at Flagstaff over night, if I remember correctly.

Q. And then did you return by automobile the next day?

A. I think we went around by the Canyon, by the rim there out the Canyon and come back the next day, if I remember correctly.

Q. Did you accompany your son on that trip as [179] you did when you went to Santa Ana that summer? A. Well, this is another son.

Q. Now, from time to time back in the latter half of 1941 and up until comparatively recent years, you made frequent motor trips to the dams of the Salt

(Testimony of Thomas J. Hughes.)

River Valley Water Users' Association for the purpose of inspecting those dams, didn't you?

A. Well, I went along with the Council Board. They make trips up there just to look things over and probably once a year. They all go together, 30 of those Council. They generally get a bus and they all go together.

Q. Well, the purpose of going is on official business for the Salt River Valley Water Users' Association, isn't that true?

A. Well, I don't know what you would call it, Council Board. There is two members from the Governing Board and the Council Board. They both go, both members go on those trips.

Q. Do you have your expenses paid when you make those trips?

A. They allow per diem and mileage just the same as they did for a regular meeting.

Q. You get—what you mean is you get so many dollars per day plus your mileage on the automobile, [180] is that it?

A. You get, I think the amount is \$4.10 a day at a meeting, rather.

Q. Yes.

A. And they are paid that same amount, I think, for the day that they go up there.

Q. Now, all 30 members of the Council do not go on this dam inspection trip at one time, do they?

A. Well, sometimes they pretty near all go. They hire one of those large busses to take the whole bunch.

Q. When was the last time you went on one of those trips for the Water Users' for the purpose of inspecting their dams?

(Testimony of Thomas J. Hughes.)

A. Oh, I haven't been on one of them trips for, I think, about three years.

Q. About three years?

A. Three—I don't remember now. I am not positive, but it has been quite awhile since I have been on any of those trips.

Q. In '41 and '42 you made all of those trips, didn't you?

A. I couldn't tell you, I don't know; I don't remember.

Q. Well, when you went on those trips will you [181] just state briefly what was done, what did you do when you went on those trips after you got to the dams?

A. Well, they just look—all of them just had to look at the dams and the construction work that was done and they had their meals up there, took lunch along.

Q. What was the object of going, why did you want to see the dams? A. Huh?

Q. Why did you go look at the dams; what was the purpose?

A. It is just a custom of the Water Users' that they adopted, or the Council, that once a year, or I think once every two years, I think it is once a year, to make those trips.

Q. And did you, yourself, get out and walk out and check the spillways on those dams?

A. No, I didn't.

Q. Never? A. No.

Q. What did you do?

A. Well, I just got out and was there on the

(Testimony of Thomas J. Hughes.)

ground where the biggest part of them was, some on the ground, I couldn't go up on—it is pretty steep to go up and I didn't go up. [182]

Q. Do you know Mr. Fred Henshaw?

A. Yes, I do.

Q. Do you know Mr. Orville Knox?

A. Yes.

Q. Did you have occasion to go with them in '41 and '42 on any trips, business trips for the Water Users'?

A. Well, I don't remember whether I did or not, but it seems to me that we had one trip, I believe, maybe we had two, I don't remember.

Q. You recall then, don't you, that early in '42 you took a trip by train to Washington, D. C. for the Water Users'? A. Yes.

Q. And that was a business trip, wasn't it?

A. Well, it was concerning the Water Users' affairs here.

Q. Well, briefly, what was the purpose of that trip?

A. The purpose of the trip was, they were taking up the income tax account that the Government claimed the Salt River Valley Water Users' owed them.

Q. You were one of the accredited representatives of the Water Users', representing the Water Users' in that controversy with the United States [183] Government, weren't you? A. Yes.

Q. Who else, if anyone, went with you?

A. Well, there was Mr. Henshaw, I am pretty

(Testimony of Thomas J. Hughes.)

sure, and I think John Dobson, I am not sure of Dobson, Vic Corbell and Lin B. Orme.

Q. Do you remember when you made that trip; do you remember the month?

A. No, I don't.

Q. It is a fact, is it not, that you spent almost the entire month on that business back in Washington, D. C.?

A. Oh, no, we was only a few days.

Q. You didn't return immediately to Phoenix, though, did you?

A. No, I stopped in Kansas City. The arthritis got to hurting me so awful bad I stopped over there for, well, I think a couple of weeks, and I was very sick in bed. That is where my sister lives, there in Kansas City.

Q. This sister that you referred to when you referred to this 40 acres south of Phoenix, is that right?

A. Yes.

Q. Now, what did you accomplish in Washington, D. C. on that trip? [184]

A. For the Water Users'?

Q. Yes.

A. I don't think we accomplished anything.

Q. What did you do back in Washington, D. C.?

A. Well, they took up the matter and the Board was supposed to write the Internal Revenue, but the Board never passed on it. They furnished them with a lot of information.

Q. Well, did your business consist primarily of conferences with men in Washington, D. C.?

A. Well, it was just with the Revenue Department or that Board that passes on the—

(Testimony of Thomas J. Hughes.)

Q. Mr. Hughes, if it weren't for the pain you say you suffer, you would not have to be disabled, would you, in your opinion?

A. The pain is all the thing that bothers me. It is just simply terrible at times, and sometimes I can't use this left arm and I can't walk sometimes, hardly at all, without pain down in my ankle and my knees and hip, and every time I make a movement like that, now, there is pain right across through here, and move the arm up. Now, it is pain, I can't go any further with it. That hurts awful bad right in here, and this arm, more right in here (indicating right arm), it is just completely knocked out with pain whenever I try to [185] move too much.

Q. Well, then, aside from the pain, you don't know of anything that is the matter with you physically or mentally, do you?

A. No, I don't.

Q. You have freedom of movement of your arms and legs, don't you?

A. What?

Q. Freedom and movement of your arms and legs.

A. I could move it, but I can't move it without pain. I can't move that arm without pain. Now, it is pain right now. Now, I move it, now that is hurting awful bad. As I come up with it, the pain is terrible.

Q. How long have you been a member of the Council of the Salt River Valley Water Users' Association?

A. Oh, a long time before I got hurt.

Q. About 16 years, is that your best recollection?

A. Oh, I think so, I couldn't tell you exactly.

Q. And what position do you occupy with the Council at the present time?

(Testimony of Thomas J. Hughes.)

A. Well, I am one of the Council members, the Council Board, and at the present time I am the Vice-Chairman of that Board. I was Chairman for [186] it for a number of years, but I am Vice-Chairman for that Board now.

Q. When did you become Vice-Chairman?

A. Well, just lately here, this last Water Users' election.

Q. In '48?

A. Well, when it was, I don't just remember the date.

Q. And during the years '41 up until you were selected Vice-Chairman, you were the Chairman of the Council?

A. I was.

Q. Now, you attended all meetings of the Council, did you not, Mr. Hughes?

A. No, I think I missed quite a good many, but I am not sure, the records will show.

Q. The records will show?

A. Yes, it will.

Q. You, in your capacity as Chairman, presided at these meetings, didn't you?

A. I did.

Q. Then you write the minutes and you sign the official minutes after the meetings are over to make a record of what business was transacted at the Council meeting?

A. Some days I don't sign them right there, [187] maybe I wouldn't sign it until I came back the next time. If my arms are hurting very bad I wouldn't try to sign it, just let it go until the next meeting. A good many of them are passed up that way.

Q. And I believe you told us there were about 30 men on this Council, is that right?

(Testimony of Thomas J. Hughes.)

A. Yes, there are.

Q. Will you tell us, please, what the official function of the Council for the Salt River Valley Water Users' Association is and has been during these six years we are talking about?

A. The Council Board is the law making body of the Salt River Valley Water Users' Association, and the Board of Governors is the administration body. Does that answer your question?

Q. Yes. In other words, your 30 man Council make the laws for your Association. is that correct?

A. By-laws, yes.

Q. Well, during a part of this time, and I am referring now to the latter part of '41 and early in '42, the Salt River Valley Water Users' Association had a special committee known as the Labor Committee, or Labor Relations Committee, isn't that correct?

A. Yes, they had a meeting something similar to [188] that to make an adjustment of claims on power that was furnished to some of the working men. The working men, some of them were given free power and some wasn't charged enough and some too much, and that Committee ironed that out to get it satisfactorily worked with these men that were working.

Q. Well, you were selected as a member of the Committee, weren't you?

A. Yes, I was.

Q. You served, did you not?

A. Yes.

Q. In what capacity, Mr. Hughes?

A. Well, just as an ordinary member of the Committee.

Q. Were you Chairman of that Committee?

(Testimony of Thomas J. Hughes.)

A. No, not that one.

Q. Was that a sub-committee of the Council?

A. Well, it was, I guess it was a Committee composed of some of the Council and some of the Board.

Q. Do you recall serving on that Committee for about six weeks during the latter part of '41 and January of '42?

A. Six weeks? It didn't take six days.

Q. How many meetings—it didn't take six days?

A. It didn't take very long. I don't remember now just the exact time, but it wasn't very long until they got it all straightened up. While they might have had a recess in between and probably it carried them over for some length of time, but there was no active part done on our part for, I don't know, quite a while.

Q. How long did this Committee function as the Labor Committee?

A. Well, I think that matter they had up there they wound it up probably in a couple of days, but then—well, I think two days, two or three days.

Q. Those were all day meetings, weren't they?

A. No, I don't think so. The meetings were very short. I think we held them in the afternoons, well, not later than ten o'clock, anyway between ten and two.

Q. Let me ask you if you recall whether or not there were some meetings at least of that Labor Committee which lasted from nine o'clock in the morning until six o'clock at night uninterrupted?

A. I don't remember, I can't recall, though.

Q. Now, did you receive compensation for your

(Testimony of Thomas J. Hughes.)

services as a member of the Council of the Water Users'?

A. Yes, just the same as all the rest of them. [190]

Q. Just a per diem? A. Yes.

Q. A nominal per diem of \$4.60?

A. Well, I think that is what it is.

Q. Do you also receive that same pay when you serve as a member of this special Labor Committee?

A. I think it is just the same.

Q. Do you recall how many were on that Labor Committee?

A. I think there were five, but I am not sure.

Q. Mr. Hughes, do you remember whether or not you settled anything, that Committee settled anything as a result of your negotiations?

A. Well, they settled that thing, that trouble between the working men about the price they was to charge for power and all.

Q. And that dispute was brought to your Committee to determine and settle, that is true?

A. They were just to get the information in regard to the different parties that was overcharged on power.

Q. Did you hear witnesses at that hearing?

A. Well, we just went to the different places, a few places where they had men there that claimed they were overcharged on power. I think they brought a few of them in. I don't know. [191]

Q. So far as you know, did you attend all of the meetings of that Labor Committee?

A. Well, I think all but one.

Q. Did you participate in the decision which was

(Testimony of Thomas J. Hughes.)

rendered that ultimately disposed of the controversies that you were then considering?

A. I don't think so.

Q. Was there anything in writing or any written record made of that?

A. I don't think there was, I don't remember.

Q. Were there any written minutes kept of what business was transacted at that particular time?

A. I don't remember whether there was or not.

Q. Are you a member of the Labor Committee of the Council at this time or of the Water Users'?

A. No.

Q. Do you hold any official position with the Water Users' other than Vice Council, Vice-Chairman, rather, of the Council?

A. That is all.

Mr. Hull: That is all.

Redirect Examination

Mr. Laney:

Q. Mr. Hughes, counsel for the Company has shown you a large number of checks here and brought [192] from you about your paying checks for baling services, for preparing land, for thrashing, and I will ask you if before you became disabled who did all of that work?

A. I did all of it.

Q. State whether or not you had your own baler there.

A. I owned my own baler.

Q. Did you operate it?

A. I did.

Q. I assume you hired a few hands to help?

A. I had help and I operated it.

Q. You had your own thresher before you were disabled, I take it?

A. And I have it yet.

(Testimony of Thomas J. Hughes.)

Q. Did you operate that before you were disabled? A. I did.

Q. Did you go around plowing and do your own renovating and preparation of the land?

A. I did.

Mr. Hull: Your Honor please, I am going to object to the leading examination.

The Court: Yes.

Mr. Laney: Q. Before you were disabled, who cut and baled your hay before you were disabled?

A. I cut it myself.

Q. And after you were disabled, why, did you employ those custom workers to renovate your land and prepare your land and bale your hay and thresh your grain, and so on; why did you do that?

A. I couldn't do it myself.

Q. Why couldn't you do it?

A. Because I was crippled up.

Q. Now, opposing counsel brought from you that you just hurt, you just have pain. What is the condition of your joints all over your body?

A. Well, they are awful bad. They pain an awful lot.

Q. What, with regard to free movement or being stiff?

A. They are stiff all the time, and the shoulder, this one is awful stiff, (indicating left shoulder).

Q. Now, opposing counsel questioned you at considerable length about being on the School Board. Do you get any pay out of that?

A. None whatever.

(Testimony of Thomas J. Hughes.)

Q. How long were you on the School Board before you became crippled up?

A. Oh, I think some few years. I don't just remember how many.

Q. Now, who is it that actually makes up the [194] budget?

A. Well, the principal makes up the budget, but the Board passes on it.

Q. And who is the principal?

A. Miss Lynd.

Q. Miss Lynd? A. Yes.

Q. Now, as to this position as a member of the Council or the By-law making body, as you say, of the Water Users', have you ever had any compensation out of that other than this nominal amount as counsel calls it, of four dollars and something per day for meetings? A. That is all. That is all.

Q. How many meetings a year about do you have?

A. They have quarterly meetings each year, the Council does, but sometimes they have special meetings. Now, I don't know. We haven't had one this year so far, I don't think.

Q. And on the average, how many meetings a year would you say you have then of the Council?

A. Oh, I think probably we have four a year, and if we have a special meeting that will be five, but sometimes I don't think we have any special meeting at all during the year.

Q. And I will ask you about when—counsel [195] brought from you that you went up to Flagstaff. Did you drive the car? A. No, sir, I didn't.

Q. Who drove it? A. My son drove it.

(Testimony of Thomas J. Hughes.)

Q. When you went around by the Canyon, did you drive it?

A. No, I never did drive it.

Q. And then counsel brought from you about you going on some inspection trip or trips to some dams, or went up and looked. Did you drive up there?

A. No, the Council went in a big bus, all of them together.

Q. And were you able to even walk around on the dam without pain?

A. No, I have not been able to walk around any without pain at all, pain all the time.

Q. And so, then, as to these checks that you paid for the various items here, I will ask you whether or not you would pay them in the due course when the bills came due? A. Yes, I did.

Q. You can still write? A. Yes.

Q. Then how would those various bills come to you; state the various ways that they would come [196] to you.

A. The parties that done the work would come over and bring me a statement of the work that they done and I gave them a check for their money.

Q. Would any of them come by mail, or do you recall?

A. Those contractors and the baling and the harvesting and all of that, they generally drove over to the ranch to get their money.

Q. Now, were you able to go out in the fields to determine when the alfalfa got—ought to be cut and when this and that ought to be done on the farm?

(Testimony of Thomas J. Hughes.)

A. No, I was not. I had a foreman that looks after all of that.

Q. I will ask you whether, before you were crippled up you did all of that?

A. Oh, yes. I didn't have any foreman at all before I got crippled up.

Q. I will ask you whether, to get out around the ranch to be active is necessary in order to properly even supervise it?

A. Sure is.

Q. Now, Mr. Hughes, opposing counsel brought from you that you went on some trip with some officials of the Water Users' back to Washington, [197] D. C. to try to get some relief about income taxes, I believe you said?

A. Yes, it was.

Q. Now, on that trip I'd like to have you relate to this jury just how you got along. Did you take your cane with you then?

Mr. Hull: If your Honor please, I object to that, it is leading.

The Court: Yes.

Mr. Laney: Q. Well, did you or didn't you?

A. Answer it?

The Court: No, it is a leading question.

Mr. Laney: Q. Did you have any trouble or not about your cane? Just tell the jury what happened and how you got along on that, that trip back to Washington.

A. I didn't get along very good. This is the cane that was given to me by my son. I left it here, I didn't take any cane with me, but I had to get one when I was in the hotel. I didn't much need it when I was on the train because I didn't go out of the compart-

(Testimony of Thomas J. Hughes.)

ment, but when I got to Washington at the hotel, why, Mr. Orme got hold of the porter there and we got one from him so I could use it to go around.

Q. How did you feel? Describe to the jury how [198] you were.

A. Couldn't walk at all without pain and couldn't get along at all without that cane.

Q. And then on your return back you say you did go to some city in the Mid West?

A. Well, I stopped in Kansas City.

Q. What was your condition while you were there?

A. Well, I was in a pretty bad fix. I had more pain than I ever had, you might say, because I think it was pretty cool there, and damp weather.

Q. Now, opposing counsel asked you if you had any other trouble except pain. I will ask you to state what effect, if any, upon the pain it has if you try to do any work?

A. Well, it bothers me so much here in the spine, up here, it just makes me sick at my stomach. I got to lie down.

Q. And if you tried to move about in the fields what effect does it have, if any?

A. Well, the same effect. It just pains all over, my knees and ankles, joints, all pain.

Q. Oh, counsel brought from you something about the equivalent of four years in college. How long did you spend over at—I believe he brought from you you spent some time in the old Tempe Normal School? [199]

A. Yes.

Q. Well, what kind of courses did they have

(Testimony of Thomas J. Hughes.)

there? State whether you went direct from Grammar School into that Normal School?

A. Well, this course they had here was the teachers' course, three years' course.

Q. Pardon me. Just answer my question. Did you have to graduate from High School before you went into the Normal at that time, or did you go into the Normal direct from the grade school?

A. Well, Mr. Laney, the school I went to, after I left the country school, was the Kansas Normal College.

Q. You went direct from the grade school?

A. Yes, the Kansas Normal College, to finish up and take science studies. I went to this Territory Normal, I think it was two years.

Q. Now, opposing counsel brought from you that your farms made more money now than they did back in '40, I believe you said, or '41. Just briefly, why is that?

A. Well, the increased price in the stuff that you sell.

Q. Everything up?

A. Everything has gone up but the taxes now are cutting in on that. [200]

Q. Now, when they talk about your nine hundred or thousand dollar milk check per month, what do you pay the milker, the man that has charge of that, how much a month approximately do you pay him?

A. Well, his runs probably \$190 a month.

Q. And you furnish him a house and you furnish him his milk?

A. Lights and water and everything.

(Testimony of Thomas J. Hughes.)

Q. I believe you said you have a foreman there for approximately \$50 a week, is that right?

A. Yes.

Q. And furnish him that, and then you have to pay these various expenses, power?

A. Expenses, power and all of the expense.

Q. Now, opposing counsel brought from you that you served as administrator in an estate at some time. Now, who did all the work in connection with that?

A. Well, Mr. Green and Scott there.

Q. The local attorneys? A. Yes.

Mr. Laney: And, may it please the Court, I think I am just about done, but may I check my notes just a few moments and see if there is something—the examination was quite long, so if we [201] could adjourn now.

The Court: Well, you have five minutes. Go ahead.

Mr. Laney: Well, all right, I have to read this through. I haven't seen it.

Q. Now, Mr. Hughes, counsel brought from you that there was something in the way of an inspection done by the attorney in connection with this estate matter, some investigation. Were you able to make any such investigation yourself?

A. No, I wasn't, Scott made it, Scott and Green.

Q. Did you make any? A. I never did.

Mr. Laney: That is all.

Mr. Hull: That is all.

(The witness was excused.)

The Court: We will suspend until 2:00 o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12:00 o'clock, noon.)

2:00 o'clock, p.m.

All parties being present as heretofore noted by the Clerk's record, the trial resumed as follows:

Mr. Laney: Mr. Crane. [202]

ALEX D. CRANE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. Alex Crane.

Q. What is your profession?

A. Certified Public Accountant.

Q. And duly licensed and practicing as such here in Phoenix, Arizona?

A. Yes, sir.

Q. And, Mr. Crane, I will ask you whether, at our request, you have made some computations of figures and interest in connection with this case?

A. Yes, sir.

Q. Now, Mr. Crane, just assuming for the sake of the computation, an amount of money falling due, an amount of \$228.02 falling due on June 30th, '42, and then the same amount on June 30th, 1943, and '44 and '45, '46 and '47, making the six payments, the principal amount of that would be how much, of those six?

A. \$1,368.12.

Q. \$1,368.12. Now, Mr. Crane, what have you [203] computed the amount of interest at six per cent per annum upon those six payments of \$228.02 up to January 31st, 1948?

A. Yes, sir.

Q. And what amount of interest is that?

A. \$253.08.

(Testimony of Alex D. Crane.)

Q. \$253.08. That is interest to January 31st, 1948, is that correct? A. That is right.

Q. Then I will ask you, Mr. Crane, just to give me the total, if you got the total of that.

A. \$1,621.20.

Q. Then assuming, Mr. Crane, that there was a payment of \$78.11 due on February 1st, '42, and then that same payment of \$78.11 due on the—was due on the first day of each and every month thereafter up to and including the month of June of 1945, then assume that after June 1st, '45, there became then due on the first day of each and every month thereafter the sum of \$104.14, I will ask you whether you have figured the amount of the principal, that is, inclusive of interest on those payments?

A. Yes, sir.

Q. And how much of those?

A. The principal of \$78.11 due each month up to [204] June, 1945, is \$3,202.51.

Q. \$3,202— A. 02.51.

Q. 51. A. That is \$78.11.

Q. That is the principal on \$78.11 payments to—that is what date?

A. To June 1st, '45. From July 1st, '45 to January 31st, '48, the principal on \$104.14 is \$3,228.34.

Q. \$3,228.34? A. Yes, sir.

Q. Total and principal then?

A. Yes, \$6,430.85.

Q. And then that second item was principal on, what was that? A. \$104.14.

Q. That is to January 1st? A. '48.

Q. And now have you computed the amount of interest at six per cent per annum on each of those

(Testimony of Alex D. Crane.)

monthly assumed payments up to January 31st, '48?

A. Yes, sir.

Q. Pardon maybe those are payments—

A. January 31st— [205]

Mr. Laney: Q. January 31st instead of January 1st. And how much is that interest?

A. Well, the interest on the \$3,202.51, which is the \$78.11 payments, is \$832.65, and the interest on the other amounts, which is the \$104.14 payments is \$258.27.

Q. Then the total of the principal and interest on both the \$78.11 payments and the \$104.14 payments would be how much? A. \$7,521.77.

Q. \$7,521.77?

A. Yes. That is the principal and the interest.

Q. And then assuming those payments that we first asked about, supposedly the annual premium payments, get that back, that \$1,621.20 with the interest? A. That is right.

Q. And adding that then to the 75—to the amount of the principal and interest of the monthly alleged benefit payments, that total amounts to what?

A. I haven't got that.

Q. Well, do it right quick. I will ask you if I am doing it right here, \$9,142.97.

A. That is correct, \$9,142.97.

Q. Then that would be, assuming these payments [206] are due, the principal and interest, that is the total principal and interest to January 31st?

A. '48.

Q. '48. Now, Mr. Crane, I will ask you whether at our request you have computed the interest on these

(Testimony of Alex D. Crane.)

several principal sums that we have spoken about, not the interest on interest, but interest on the principal sums then from January 31st, 1948, to date?

A. I have.

Q. And what is the total amount of that interest?

A. Well, the total amount—the interest on the \$1,621.20 is \$58.59, and on the other amount, \$6,430.85 is \$275.62.

Q. Now, that is all at six per cent per annum?

A. Yes, sir; that is the total of \$9,477.18.

Q. Then that is the total of principal and interest on this hypothesis to the present date?

A. That is right.

Q. \$9,477.18. Thank you. You may take the witness.

Mr. Meason: No questions.

(The witness was excused.)

Mr. Grant Laney: Mr. Painter. [207]

ROY PAINTER

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. State your name, please.

A. Roy Painter.

Q. Where do you live, Mr. Painter?

A. About three miles south of Tempe.

Q. Do you live not far from the Tom Hughes ranch?

A. Not very far.

Q. Do you know Tom Hughes?

A. Yes.

(Testimony of Roy Painter.)

Q. How long have you known him?

A. Since about 1917 or '18.

Q. I will ask you if you noticed any change in his physical condition along about 1935 or thereabouts?

A. I did.

Q. And what did you notice in that respect?

A. I noticed he is getting awful stiff.

Q. Did you see him frequently from '35 up until the present time? A. I did. [208]

Q. Have you been to his place many times?

A. Many times.

Q. I will ask you if you are serving on any school board? A. Yes, sir.

Q. And what school board is that?

A. Rural School 13.

Q. And is that the same board that Mr. Tom Hughes is a member of Board of Trustees?

A. Yes.

Q. I will ask you where you hold your meetings of that school board?

A. Sometimes at the school house, sometimes at Mr. Hughes' house.

Q. Do you hold those very often at Mr. Hughes' home? A. Quite often.

Q. Why do you hold them at his home?

A. Because he is not able to come to the school house.

Q. He is not able because of what?

A. Because of his arthritis, or whatever it is.

Q. Because of his crippled up condition?

A. Yes.

Q. I will ask you to state whether or not, in con-

(Testimony of Roy Painter.)

ducting those affairs of the Board of Trustees [209] of the School District, if it is often necessary for the members to sign certain papers and documents?

A. It is.

Q. Where are those signed?

A. Where we meet, either at the school house or at his house.

Q. Do you sometimes take those papers to his home for him to sign them? A. I do.

Q. And why do you do that?

Mr. Hull: I object to that, calls for a conclusion.

The Court: Yes, I think so.

Mr. Laney: Q. Now, in all the time that you have seen Mr. Hughes since the year '35, have you ever seen him drive a tractor?

A. I have seen him try to.

Q. How many times?

A. I think only once.

Q. And did he drive it? A. Not very long.

Q. And just tell the jury what you observed about his condition, about his driving a tractor at that time?

A. Well, he got so sore that he got sick. [210]

Q. Did he complain of pain at that time?

A. He did.

Q. Now, during the period of time from '35 to the present time, has he complained of pain to you?

A. Many times.

Mr. Hull: Now, I am going to object to this entire line of questioning, because it is entirely too leading, counsel is testifying. This witness is capable of doing that.

The Court: Yes.

(Testimony of Roy Painter.)

Mr. Laney: Q. What have you observed about the way Mr. Hughes gets around and walks?

A. He gets around with a cane the best he can.

Q. And what else have you observed about his ability to move about?

A. Well, he is very stiff.

Q. Now, I believe you stated awhile ago that you—well, I will reframe it. Have you ever seen Mr. Hughes do any work at all since '35?

A. Very few times.

Q. Do you remember any of those occasions?

A. Yes, once he tried to drive a tractor. He was scraping borders.

Q. What was the result of that, just tell the jury.

A. Well, he had to quit. [211]

Q. Where did he go? A. Went to the house.

Q. Did you notice what he did when he went to the house? A. He laid down.

Q. Have you seen him lay down on other occasions?

A. Pretty near every time I go there he is either laying down or sitting down.

Q. Have you ever seen Mr. Hughes walking out over his farm?

A. No, as far as he ever gets is at the barn, about a hundred yards, probably.

Q. Well, from your observation of Mr. Hughes over these years, are you able to say whether or not, in your opinion, he could do any work on his farm?

Mr. Hull: I object to that as calling for a conclusion of the witness.

(Testimony of Roy Painter.)

The Court: Sustained.

Q. (By Mr. Laney): Now, before the year '35, before Mr. Hughes got disabled, what did you observe——

Mr. Hull: I object to that, because he is calling for something not supplied by this witness, nothing, no showing here from this man that Mr. Hughes is disabled.

Mr. Laney: All right, we will withdraw the [212] question.

Q. Before Mr. Hughes got in this condition that you have described here on the witness stand, what did you observe about his working?

A. Well, he did all of his own work, baling hay, thrashing, plowing and disking.

Q. How is that work done on the Hughes farm now or since he became——

Mr. Hull: He has not shown he knows how the work is done.

Mr. Laney: Well, withdraw it then.

Q. Do you know how Mr. Hughes has had his work done on his farm since he got in this condition that you have described on the witness stand?

A. Yes.

Q. How? A. Contract.

Q. Contract. That is, custom people?

A. Custom contracting.

Q. Explain to the jury what you mean by "custom contracting."

A. Well, there is a bunch of men around the Valley that does different kinds of jobs like baling hay,

(Testimony of Roy Painter.)

thrashing, plowing, disking and renovating. He hires those to do his work.

Mr. Laney: Take the witness. [213]

Cross-Examination

Mr. Hull:

Q. Mr. Painter, in '47 there was quite extensive negotiations, were there not, with Mr. Solaris, of Guadalupe, as to the leasing or purchasing of a building owned by him for the school there, by the School Board? A. Yes.

Q. Now, during these discussions and negotiations, just tell us whether or not Mr. Hughes, in his capacity as a member of the Board, was present and took part in the discussions?

A. He was out there one time.

Q. Now, was that in regard to the leasing or the purchasing of that building to be used by the School Board?

A. We talked to him about purchasing it, but we had no way of buying it without a bond issue and you could never get that School District to vote a bond issue for the Yaqui Village.

Q. Then you didn't buy the building for \$1800?

A. Mrs. Roberts bought the building. Mr. Solaris said if we didn't buy it he was going to sell it. Mrs. Roberts bought the building and is leasing it to us.

Q. In other words, the School District did not buy the building, somebody else bought the building and you are leasing it?

A. The School did not buy it, had no funds to buy it with.

(Testimony of Roy Painter.)

Q. What is your business, Mr. Painter?

A. Farming.

Q. Now, you have testified that prior to '35, that Mr. Hughes did all of his own thrashing, baling, disking, plowing, harvesting of all of the crops and did all of his farm work. Did he do that all alone?

A. No.

Q. He employed labor?

A. He employed labor.

Q. He employed regular and extra regular help as the needs of the farm and the production of the farm called for?

A. He employed both kinds of labor.

Q. Do you do all of your own disking, plowing—
Mr. Laney: I object to the question as to what he does.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Hull): You have testified, Mr. Painter, that Mr. Hughes does all, or substantially all, of the preparation of his ground, his farming and the harvesting of his crops by contract? [215]

A. That is right.

Q. I will ask you, Mr. Painter, if that is not the usual custom, practice and usage of the farmers in Maricopa Valley, farming any substantial acreage at all, now to contract practically all of the tillage, preparation of your soil, for thrashing, baling, and harvesting of their various crops?

A. Not on preparing land. For threshing and baling, yes.

Q. How about the preparation of the land?

(Testimony of Roy Painter.)

A. Preparation, why, the vegetable growers, I should judge about half of them contract their preparation of land, but the diversified farmer does not.

Q. All right, in the preparation of hay, of the land for growing alfalfa, is it the usual custom and practice of contracting that, or doing it alone?

A. We always did it ourselves.

Q. One man could take a tractor and prepare the land for planting for alfalfa? A. Yes, sir.

Q. Assuming that Mr. Hughes were younger, and so forth, he could do that himself?

A. He could do it on a certain amount of land.

Q. Well, let's confine that, Mr.—I am sorry [216] I didn't do that before, but confine it to the 160 acres that Mr. Hughes has, known as the home and the Blake place. Could he take care of that?

A. No, he couldn't take care of all of it, to do the work there.

Q. Well, he would not be able to prepare that for planting, to take care of the crop while it was growing and to harvest it all by himself, just too much land for one man to handle?

A. Too much land for one man to handle.

Q. Especially when you consider he has some 60 odd head of cattle to take care of at the same time, and by "cattle" I mean dairy stock to milk; I am not referring now to the ranch cattle, it would not require any particular amount of attention, but you take into consideration the fact of the dairy, it would be impossible for one man to conduct all of that business, would it not?

(Testimony of Roy Painter.)

A. 50 head of cows is one man's job to milk and take care of.

Q. Regardless of the condition of the individual physically? A. That is right.

Mr. Hull: That is all. [217]

Redirect Examination

Mr. Laney:

Q. Well, one man with the usual amount of hired help that a farmer employs could take care of it easily, couldn't he? A. Yes.

Mr. Laney: That is all.

Mr. Hull: That is all.

(The witness was excused.)

Mr. Laney: Mr. Evans.

H. A. EVANS

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. State your name, please.

A. H. A. Evans.

Q. Are you a neighbor of Mr. Hughes?

A. Yes, sir.

Q. You have known Mr. Hughes about 13 years, haven't you? A. About 11½.

Q. Are you a farmer?

A. I have farmed, I am not farming now. I have.

Q. Do you live on that farm? A. Yes, sir.

Q. Have you seen Mr. Hughes frequently since

(Testimony of H. A. Evans.)

you have known him those 11½ years? A. Yes.

Q. Have you been at his place many times?

A. Many times.

Q. What has been his physical condition since you have known him?

A. Well, you come into his house, you find him in a chair and he gets up, you can see that he is kind of, makes an effort, you know, to move around. Sometimes you will find him lying on the cot in the living room.

Q. Now, do you ever drive Mr. Hughes places?

A. I have driven him about five or six times to Phoenix, he couldn't use his arms, so he asked me if I'd go to town to pick him up. He had to go to the Water Users', you know, also once or twice to the doctor. Of course, I don't know exactly for what purpose. Pretty hard to remember.

Q. And what did you observe about his way, the way he got around, his ability to walk?

A. Well, not very capable to walk.

Q. Just tell the jury what you know about that.

A. Well, you know, he kind of limps, and [219] one time I was walking with him to the basement to the Water Users', and he was holding on, you know, to me. There is a few steps down there. He was scared he was going to fall over.

Q. Have you ever seen Mr. Hughes drive a tractor or do any work on his farm? A. No.

Q. Does he milk?

A. I never was to his barn.

(Testimony of H. A. Evans.)

Q. But you have never seen him do any work at his farm since you have known him?

A. Oh, I have seen him sometimes from the highway in the pickup kind of looking at his place.

Q. Have you ever seen him out walking in his fields or going out in his fields?

A. No. He's got a pretty good sized job. Sometimes on the lawn I have seen him, but not in the fields.

Q. At the time you saw him walking, where was he walking?

A. Near the house, on the lawn. He has got a lawn in front of his house.

Q. You spoke awhile ago of seeing him lying down. How many times, would you say?

A. Well, I make his place about eight or nine times a year, you know, so it is pretty hard to [220] remember, maybe two or three times—four times.

Q. Does he use anything to help him out in walking?

A. That cane, the cane he uses.

Q. Has he always used a cane since you have known him?

A. Since I have known him.

Mr. Laney: Take the witness.

Mr. Hull: No questions.

(The witness was excused.)

Mr. Laney: Mr. Freestone.

GEORGE L. FREESTONE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. State your name, please.

A. George L. Freestone.

Q. Where do you live, Mr. Freestone?

A. East of Mesa on the Gilbert Road near the Temple.

Q. What is your occupation? A. Farming.

Q. Do you know Tom Hughes? [221]

A. Yes, sir.

Q. How long have you known him?

A. Oh, about 25 or 30 years.

Q. Have you had occasion to go to his home?

A. Yes.

Q. How often?

A. Oh, I wouldn't say how often, several times.

Q. Are you on the Council of the Water Users'?

A. Yes, sir.

Q. And how long have you been on the Council?

A. I think about 15 years.

Q. And I will ask you if you ever called at the Hughes Ranch for Mr. Hughes in connection with Council meetings? A. Yes, sir.

Q. Just tell the jury what you observed at Mr. Hughes' house, why you went there.

A. Well, I went there because I understood, in fact, I knew he was unable to handle his own auto-

(Testimony of George L. Freestone.)

mobile to attend these meetings of the Council, so I went up there to pick him up, to take him over to these meetings, that he might be able to attend these meetings. I also brought him back.

Q. What did you observe about his condition, physical condition?

A. Well, I have always observed that for the [222] last several years, that he was very much handicapped in getting around.

Q. And what did you observe about his ability to get in and out of an automobile?

A. It was very hard for him to get in and out, sometimes I have to help him.

Q. Now, have you ever gone to his place when he didn't go anywhere with you or when he didn't go out of the house?

A. Well, I don't remember. I don't remember it, of an occasion of that kind.

Q. Well, when you called for him to take him to the Council meeting, did he always go?

A. I think with the exception of once or twice he always went.

Q. What was his condition on those occasions?

A. Well, he felt as though he wasn't able to go.

Q. Was he up or in bed, or what?

A. Well, it usually seemed to me he had a cot out on the porch. I am not sure that he was lounging around. It seemed to me like he had some kind of a place or something that he would lounge around on.

Q. What did you observe about Mr. Hughes' ability to walk? [223]

(Testimony of George L. Freestone.)

Q. Did he use any—

A. He used a cane; in fact, he used a cane all the time practically, and I have seen him on crutches.

Q. And in all of the time that you have known him since?

A. Yes—practically since I have known him, this condition the last eight or ten years.

Q. Did you ever see him do any work on his farm?

A. I never did.

Mr. Laney: Take the witness.

Cross-Examination

Mr. Hull:

Q. Mr. Freestone, you have been a member of the Council? A. Yes.

Q. That is the Salt River Valley Water Users' Council since how long? A. Yes, sir.

Q. When did you first go on the Council?

A. I don't know what year it was, it was about, maybe 12 or 15 years.

Q. You have been a member since '41? [224]

A. Yes.

Q. During this period of time, Mr. Freestone, have you attended the meetings; that is, the regular and the special meetings of the Council regularly when you were here?

A. Always when I was at home. A time or two I was away, and of course, when I was away I didn't go.

Q. Unless you were away, at all times you attended the meetings? A. Yes, sir.

(Testimony of George L. Freestone.)

Q. You have missed none of the meetings because of illness yourself? A. No, sir.

Q. Now, as a member of the Council, Mr. Freestone, did you make any of these inspection trips to the various dams? A. Yes.

Q. During the period, of course, June, 1941, and the present time? A. Yes.

Q. On the inspection trips which you made in company with the other members of the Council to the dams, did Mr. Hughes accompany you on those trips? A. Yes, I think he did. [225]

Q. Do you remember what the means of transportation—what means of transportation was used?

A. Automobiles.

Q. Private automobiles?

A. Most of them private automobiles. Some of them they had a few busses, but that was the way I—that is my way of going, was by my own automobile.

Q. What dams are we referring to when we say “dams” that the Council members went to on inspection trips?

A. Well, it was—what is that new dam of ours?

Q. Would it be Roosevelt, Horse Mesa, Canyon Lake?

A. Canyon Lake, or those dams—well, not Canyon Lake either. It was up on——

Mr. Laney: Was it Stewart Mountain?

A. Stewart Mountain, yes.

Mr. Hull: Stewart Mountain and Horseshoe?

A. Yes, Stewart Mountain and Horseshoe.

Q. Did Mr. Hughes perform the duties as Chair-

(Testimony of George L. Freestone.)

man of the Council in a good and businesslike manner at all times?

A. Whenever he was there, and he was there most of the time, I think.

Q. And as far as taking care of the business of the Water Users' Association, he was entirely [226] capable, was he not? A. Absolutely.

Q. And has, in fact, been very capable and a very excellent member of the Council?

A. I would say so.

Q. In furthering of the business of the Salt River Valley? A. Yes, I would believe so.

Mr. Hull: I believe that is all.

Mr. Laney: That is all.

(The witness was excused.)

Mr. Lynn Laney: Miss Lynd.

LOUISE LYND

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Lynn Laney:

Q. What is your name, please?

A. Louise Lynd.

Q. What is your profession, Miss Lynd? It is Miss Lynd, is it?

A. Yes. I am Rural Supervisor for the State Teachers College in Tempe.

Q. And as such do you have anything to do with [227] the particular school on the Board of which Mr. Hughes is a member?

(Testimony of Louise Lynd.)

A. Yes, we use that school for a training school for rural teachers.

Q. For the State College at Tempe?

A. For the College.

Q. You know Mr. Hughes, of course?

A. Yes.

Q. About how long have you known him?

A. Well, he has been on our Board 13 years, and his children went through our school, and the youngest one is a practicing physician. That is practically a long time.

Q. Now, Miss Lynd, during this period, we will say from '35 on to the present time, what have you observed as to Mr. Hughes' physical condition?

A. Well, he has been increasingly lame. He has always walked with a cane since he has been on our School Board, I think.

Q. And what have you observed as to his ability to get around and walk?

A. Well, it is very hard for him.

Q. And as to the work on the School Board there, who prepares the budget for the submission to the Board?

A. We have a bookkeeper who keeps track of all [228] the accounts and she and I make the budget.

Q. And that is then submitted, I suppose—

A. That is submitted to the Board.

Q. And then who employs the teachers, who directs them?

A. I do. That was the understanding with the College when we took over these schools for training that I should have the employment of the teachers.

Q. Now, what have you observed about Mr.

(Testimony of Louise Lynd.)

Hughes' health in connection with any Board meetings?

A. Well, he often comes when we feel he should not, and his wife feels that he should not, and when he gets there—we only live on the other side of the mile from him, and I go to his house when he can't come and we have the papers to be signed, we take them to him if there are teachers in town.

Mr. Laney: That is all. You may take the witness.

Cross-Examination

Mr. Hull:

Q. Now, Mr. Hughes' activity as a member of the School Board during—there are a few questions I will ask you, and I will refer to him in that capacity only—he is always consulted, is he not, [229] by other members of the Board and by yourself?

A. Oh, he is.

Q. In all questions relating to the welfare of the School District? A. Yes.

Q. And his information in that respect is of value to all of you? A. Yes, it is.

Q. Is he capable in his handling of the affairs for the School District?

A. Yes. There isn't a very great deal of handling.

Q. There are decisions to be made?

A. There are decisions to be made and we are always calling for his opinion.

Q. On matters of policy, probably, rather than administration? A. Yes.

Mr. Hull: I think that is all.

Mr. Laney: Thank you.

(The witness was excused.)

Mr. Grant Laney: Mr. Charles Saylor.

CHARLES SAYLOR

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows: [230]

Direct Examination

Mr. Grant Laney:

Q. State your name, please.

A. Charles Saylor.

Q. Where do you live?

A. Well, I am now living in Tempe.

Q. And what is your business or occupation?

A. Well, now, and it has been for ten years, custom hay baling.

Q. Do you know Tom Hughes? A. I do.

Q. How long have you known him?

A. Oh, I have known him since about '30.

Q. Do you recall anything or any change in his physical condition about the middle of the thirties, along '35, somewhere along there?

A. Well, yes. When I first knew of him, why, he didn't use a cane, and along in, about that time, '34 or '35, why, he was using a cane.

Q. Did you observe what kind of work he did before he started using his cane?

A. Oh, yes, he drove a tractor, plowing and combined it, and he even baled his own hay.

Q. And thrashed his own grain, did he?

A. Yes.

Q. Now, after—about the year '34, '35, as you [231] say, what did you observe about his working?

A. Well, I observed why he was hiring more tractors to do it. He was letting up on it.

(Testimony of Charles Saylor.)

Q. And since along about the middle of the thirties, have you ever seen him do any work himself?

A. No, I didn't.

Q. What would you say about his ability to get around?

A. Well, he needs a cane and he seems to be stiff, crippled.

Q. Now, have you been at his home?

A. I have.

Q. And have you noticed whether or not he is up and about all the time?

A. Well, in collecting for my baling he was always in the house, and I don't know, he would always answer the door.

Q. Well, have you ever seen him lying down?

A. Well, yes, I seen him lying down. He was out in the yard swing one day when I drove in. He was lying down.

Q. When you go there to do this custom hay baling does he come out in the fields and supervise it?

A. I don't believe I have seen him over three [232] or four times.

Q. In the field?

A. In the field.

Q. How many times have you been there baling hay?

A. Oh, I baled, I must have baled ten or twelve times over a period of years from '37 up to about '30—or '46.

Q. How many times a year would you bale?

A. Well, there was one year there that I had all of his baling, in '38, I believe. It was three crops.

Q. Have you ever seen him drive a tractor?

(Testimony of Charles Saylor.)

A. I have not.

Q. Have you ever seen him do any other kind of work? A. I have not.

Q. Did he ever complain of pain to you, his arthritis?

A. No. The only thing he ever said one day, he was down in the field in his truck and he said, "I have got to get back to the house and lay down." That is all he said.

Mr. Laney: Take the witness. [233]

Cross-Examination

Mr. Hull:

Q. Mr. Saylor, you testified that in the middle thirties or around '35 and thereafter, that Mr. Hughes apparently did more farm contracting than he did previously.

A. Well, what I meant by that, then, it was about that time that I noticed he started hiring more work done.

Q. Were you in the contract baling business at that time? A. Well, no, I wasn't until '36.

Q. Were you living in the Valley?

A. I had been living within three miles of his place.

Q. Were you either engaged in or acquainted with the business of farming and ranching in the Valley prior to engaging in the contracting business?

A. Yes.

Q. Isn't it a fact, Mr. Saylor, that prior to the middle thirties, that there was—it was the usual custom of the farmers to do as little contracting as possible? A. Well—

(Testimony of Charles Saylor.)

Q. In other words, wasn't the depression still [234] on then?

A. Yes, the depression was still on.

Q. And after the thirties, after the middle thirties, excuse me, let's put it and make it more confining to after '35, did not the farm contracting business pick up considerably throughout the Valley?

A. Well, in some instances, yes.

Q. More farmers would, starting during that period, let contracts for farming, for the preparation and planting, tillage of the soil, this preparation of the soil?

A. Yes.

Q. And all phases of farming were contracted more than they ever had been before? Did I make myself clear?

A. No, I don't get you.

Q. I will reframe my question; I got mixed up myself. The contracts—did not the contracts or contracting for farming crops; that is, plowing, preparation of the land for planting, planting and the harvesting of crops become more extensive in the Salt River Valley after '35 than it had been prior thereto?

A. Well, just heavy work maybe subsoiling or plowing, but when it come for the farmers who had [235] all of their equipment to put in their own grain and everything that naturally they would not hire it done.

Q. They would do the planting?

A. Yes, they would do the planting.

Q. They would do their own planting?

A. And preparation for the planting.

(Testimony of Charles Saylor.)

Q. Now, explain to us what you mean by "preparation"?

A. Well, irrigating, disking, and drilling.

Q. It was the practice for farmers to do all of their own irrigating?

A. If they had hired help.

Q. They practically always had to hire help to do their irrigating? A. Practically all.

Q. Hired help for disking and planting?

A. Yes.

Q. The same was true in baling hay?

A. If he baled his own hay he had to have hired help. If he baled his own hay, naturally he would have hired help.

Q. Threshing would be the same?

A. Threshing.

Q. Now, you stated that when you would come to Mr. Hughes' ranch to collect your money for your [236] baling operations or threshing operations, that you found him on a number of occasions inside of the house?

A. Well, he was in the house on except one occasion.

Q. Now, isn't it true, Mr. Saylor, that other farmers from whom you collect also were in their house when you called upon them for payments?

A. No, very seldom.

Q. They were always right there?

A. They were hiding from me, all the others were hiding from me.

Q. They were hard to find, but Mr. Hughes couldn't get away?

(Testimony of Charles Saylor.)

A. No, he couldn't get away.

Q. Now, you mentioned also that during those 12, 13 or 14 times, I think it was, and I am not quibbling about the number of times that you worked for Mr. Hughes, that he appeared in the fields two or three times, whatever it was? A. Yes.

Q. And wasn't it the practice of other farmers and ranchers for whom you baled to remain in the field at all times that you were in there with the baler and the crews?

A. No, my customers as a rule, the general [237] principle with other customers was, they were always out in the field at least once a day to see if the hay was too green or too dry, or if it was ready to bale. Mr. Hughes, if he did come out, he does talk with me, but never got out of his pickup. There is a drive alongside of the field and he would ask me what I thought of it. There has been times I drove up and asked him, I thought it was too green. "Well," he says, "shut it off awhile."

Q. You are an expert, aren't you, on whether or not grain is ready for threshing or hay is ready to bale? A. Well, I am supposed to be.

Q. I am not quibbling, and your word can be taken when the other farmers asked your opinion, is it not?

A. They do if they come out and check on me.

Q. Depend on your judgment? A. Yes.

Mr. Hull: That is all.

Mr. Laney: They come out in the fields and supervise it, don't they? A. Yes, they come out.

Q. Mr. Hughes didn't? A. No. [238]

Mr. Laney: That is all.

(The witness was excused.)

Mr. Lynn Laney: Mrs. Hughes.

STELLA C. HUGHES

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please?

A. Hughes.

Q. Your first name? A. Stella C. Hughes.

Q. And you are the wife of Mr.—of the plaintiff,
Mr. T. J. Hughes? A. I am.

Q. How long have you people been married?

A. Since early in '18.

Q. Now, Mrs. Hughes, I will ask you whether you remember any change in Mr. Hughes' health along in the early thirties? Just say yes or no, whether you remember. A. No.

Q. Well, what about along in '35, did you observe it? [239]

A. Yes, I noticed that he was beginning to get stiff and he complained of pain a whole lot in his shoulders and his back.

Q. I will ask you whether from '35 on to the present time, that has remained the same or gotten better or gotten worse?

A. Well, I would say it has gotten worse.

Q. And during the time from '35 up until the present time, has Mr. Hughes, within your knowledge, made any effort to drive a tractor?

(Testimony of Stella C. Hughes.)

A. Well, I have seen him try to show a new man how to drive it, and I have seen him get on the tractor and maybe drive it down to the barn. The boy would go along with him, but I knew what was coming. Pretty soon he would come to the house and be in terrible pain and have to take aspirin and put the electric pad on his shoulders and back.

Q. Now, did you ever know of his doing any farm work without your knowing what was coming?

A. Well, not in the late years. He used to do a lot of work.

Q. Before he got in that condition, what did he do there on the ranch?

A. Well, he did all kinds of farm work. He drove the tractor, and, well, any kind of work on the farm.

Q. Well, will you describe further to the jury what you know of your own knowledge about his condition and the appearance of pain, and so on?

A. Well, I know that when he goes out and does any kind of work like lifting or trying to get the tractor—drive the tractor, that he has a lot of—that he will soon come to the house and want aspirin or want something done to relieve him of the pain.

Q. And have you ever seen him do any substantial amount of work at all since '35?

A. Well, no, I have not.

Q. And then when—at those times that you say you have observed him when he tried to work, what have you observed, if anything, about his ability to sleep after he had done it.

(Testimony of Stella C. Hughes.)

A. Well, he does not sleep. If he gets out and does any physical labor during the day, he does not sleep and he does not let anyone else sleep. He needs attention to relieve his pain.

Mr. Laney: You may take the witness.

Mr. Hull: No questions.

(The witness was excused.)

Mr. Laney: The plaintiff rests, may it please the Court.

Mr. Hull: Your Honor please, are we going [241] to have a recess at this time?

The Court: Yes, the Court will stand at recess for a few minutes. Keep in mind the Court's admonition.

(A recess was thereupon taken.)

(After recess, in chambers in the absence of the jury, the following proceedings were had:)

Mr. Hull: The defendant moves the Court to instruct the jury to return a verdict for the defendant, on the grounds that the evidence offered in the trial of this case, and I am referring now to the plaintiff's case, and taken in the light most favorable to the plaintiff, is not sufficient to support the affirmative answer to the issue as to whether the plaintiff has become totally and permanently disabled by bodily injury and diseases so that he is and will be permanently and continuously and wholly prevented from performing any work for

compensation, gain or profit, and performing any gainful occupation; that is to say, within the express provisions of the policy of insurance upon which this suit is based.

Mr. Lynn Laney: May it please the Court, the plaintiff respectfully resists the motion and cites as ample authority the case of the Equitable Life Assurance Society of the United States vs. [242] Boyd, by the Supreme Court of Arizona, quoted in 76 Pac. 2d, 752, in which the Supreme Court, in dealing with their claim that the insured had not shown he was permanently and totally disabled within the meaning of that same wording, used the language that: "Such disability means one which prevents the insured from engaging in any occupation or performing any work for compensation of financial value, and it must be total as distinguished from partial disability. Of course, the work must be substantial and not trivial, amount to a job, an occupation, and a disability under this policy does not necessarily imply an incapacity to do any work at all, or that the person must be bedridden, or that he must work where to do so would shorten his life or seriously impair his health; and the fact that he did do some work because forced thereto by absolute necessity when he was really not able to work would not change a total disability to a partial one," and going on and on and on.

Mr. Hull: I read that. I think that supports my theory.

(Argument between Court and counsel, after which a recess was taken.)

(After recess, in open court, and the jury being present, the trial resumed as follows:)

The Court: We will suspend at this time until 10:00 in the morning. Be in your places at 10:00 o'clock in the morning.

(Thereupon a recess was taken.) [244]

10:00 o'Clock A.M., October 15, 1948

All parties as heretofore noted by the Clerk's record being present, except the jury, the following proceedings were had:

Mr. Lynn Laney: May the record show, may it please the Court, that we have argued the matter of the defendant's motion for an instructed verdict in his favor, have argued that in chambers and in the absence of the jury; that the Court has indicated that he will instruct a verdict in favor of the defendant, and in that connection may the record show that the plaintiff desires to except to such ruling, and such proposed ruling, on the ground that the evidence in our view has been sufficient to make the matter of total disability within the terms of the policy a question of fact for the jury, and may the record show that the ruling sought by the defendant—that we do want the record to show that we have made known, and do make known to the Court, that the action of the Court sought by the defendant, we object to respectfully and except to it, and that we ask the Court to submit to the jury the question of total disability within the meaning of the policy as a question of fact, and submit the

issues in [245] general to the jury. That is our position.

The Court: All right. Call the jury.

(Thereupon the jury was called into the courtroom and assumed their respective places in the jury box.)

The Court: The defendant's motion for an instructed verdict is granted. You may prepare a verdict and I will appoint a member of the jury as foreman and ask him to sign it. I will appoint you foreman of the jury and ask you to sign this verdict, please.

(Thereupon Juror Herbert F. Leo signed the verdict.)

Mr. Laney: Now that the Court has granted the defendant's motion for an instructed verdict and in accordance therewith instructed the jury to bring in a verdict in favor of the defendant, the plaintiff respectfully excepts to that ruling of the Court and insists that the issues under the evidence should be submitted to the jury.

(Thereupon the jury was excused.)

Mr. Hull: May it please the Court, the case on trial of Hughes vs. Mutual Life Insurance Company of New York, now that the Court has directed a verdict for the defendant, the defendant now moves for a formal entry of judgment by the Court.

The Court: All right.

(Thereupon the trial was ended at 10:45 o'clock a.m. of the same day.) [247]

REPORTER'S CERTIFICATE

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 247 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

[Endorsed]: Filed Feb. 17, 1949.

[Title of District Court and Cause.]

STIPULATION FOR DIMINUTION
OF RECORD

It Is Hereby Stipulated and Agreed by and between the plaintiff and defendant above named, acting by and through their respective attorneys, that it shall not be necessary for the Clerk of the above-entitled court to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal, the following named papers, documents and exhibits, to wit:

1. Stipulation filed March 24, '1948, extending time for defendant to plead and answer.
2. Defendant's original answer filed April 15, 1948.
3. Plaintiff's motion to set cause for trial and notice thereof.

4. Stipulation that defendant may file amended answer.

5. Deposition of Thomas J. Hughes.

6. Notice of filing deposition of Thomas J. Hughes.

7. Defendant's praecipe for subpoena filed October 4, 1948.

8. Defendant's praecipe for subpoena filed October 5, 1948.

9. Plaintiff's praecipe for subpoena filed October 9, 1948.

10. Jury list filed October 13, 1948.

11. Defendant's memorandum of costs and disbursements filed October 20, 1948.

12. Defendant's subpoenas filed November 17, 1948.

13. Defendant's exhibit marked "B" for identification, a suitcase containing various documents which with its contents was withdrawn by the plaintiff, upon stipulation of counsel.

Dated: February 18th, 1949.

LANEY & LANEY.

By /s/ GRANT LANEY,

Attorneys for Plaintiff and Appellant.

EVANS, HULL, KITCHEL,

JENCKES & ROSS.

By /s/ RICHARD P. MEASAN,

Attorneys for Defendant and Appellee.

[Endorsed]: Filed Feb. 18, 1949.

[Title of District Court and Cause.]

ORDER TO SEND UP ORIGINAL
EXHIBITS

It appearing to the court that the original exhibits in this cause should be sent to the Appellate Court in lieu of copies;

It Is Hereby Ordered, that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the following original exhibits in this action, to be by him safely kept and returned to this court upon the final determination of this action in said Circuit Court of Appeals, namely:

All of plaintiff's exhibits in evidence and all of defendant's exhibits marked for identification save and except those expressly excluded from the record on appeal by "Stipulation for Diminution of Record" signed by attorneys for plaintiff and defendant and on file herein.

Dated February 18, 1949.

/s/ DAVID W. LING,
United States District Judge.

[Endorsed]: Filed Feb. 18, 1949.

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Thomas J. Hughes, Plaintiff, versus The Mutual Life Insurance Company of New York, a corporation, numbered Civ-1153 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing documents, to-wit:

1. Transcript of Record on Removal to the United States District Court for the District of Arizona, filed March 20, 1948.
2. Minute entry of Monday, June 14, 1948.
3. Amended Answer of Defendant, filed September 29, 1948.
4. Minute entries of Wednesday, October 13, 1948, Thursday, October 14, 1948, and Friday, October 15, 1948 (proceedings of trial including order for judgment on the verdict).
5. The final judgment, as entered by the clerk in the civil docket on October 15, 1948.
6. The verdict, filed October 15, 1948.
7. Plaintiff's Motion for New Trial, Notice of Hearing, and Memorandum of Points and Authorities, filed October 22, 1948.

8. Minute entry of Monday, November 1, 1948.
 9. Minute entry of Wednesday, January 12, 1949 (docketed January 12, 1949).
 10. Plaintiff's Notice of Appeal, filed February 8, 1949.
 11. Plaintiff's Bond on Appeal, filed February 8, 1949.
 12. Plaintiff's Designation of Record and Proceedings to be Contained in Record on Appeal, filed February 17, 1949.
 13. Reporter's Transcript, filed February 17, 1949.
 14. Stipulation for Diminution of Record, filed February 18, 1949.
 15. Order to Send Up Original Exhibits, filed February 18, 1949.
 16. Plaintiff's original exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, admitted and filed in evidence October 13, 1948.
 17. Defendant's exhibit A, marked for identification October 13, 1948; and Defendant's exhibits B-1 to B-78, inclusive, and C, marked for identification October 14, 1948,
- are the original documents filed in said case and designated in the Designation of Record and Proceedings to be Contained in Record on Appeal as amended by the Stipulation for Diminution of Record, excepting the minute entries aforesaid, and the final judgment as entered by the clerk in the civil docket, and I further certify that the foregoing copies of minute entries of June 14, 1948, October 13, 14 and 15, 1948, November 1, 1948, and

January 12, 1949, and of the final judgment as entered by the clerk in the civil docket, are true and correct copies of the originals thereof remaining in my office.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$2.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 7th day of March, 1949.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12202. United States Court of Appeals for the Ninth Circuit. Thomas J. Hughes, Appellant, vs. The Mutual Life Insurance Company of New York, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 9, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12202

THOMAS J. HUGHES,

Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF RECORD FOR PRINTING

Thomas J. Hughes, the Appellant in the above-entitled action, pursuant to Subdivision 6 of Rule 19 of the Rules of the above-named court, hereby presents the following statement of the points on which he intends to rely on this appeal:

I. That the trial court erred in granting defendant's motion to direct the jury to return a verdict for the defendant for the reason that the evidence offered by the appellant by means of testimony and exhibits, taken as a whole, was sufficient to require submitting the case to the jury on the question of whether or not the appellant, Thomas J. Hughes, ever since the year 1935 had suffered permanent and total disability from bodily injury or disease, within the meaning of those terms as used in the insurance policy involved in the case at bar.

II. The evidence introduced by the plaintiff in the case at bar, taken as a whole, established that

he was so disabled as to render him unable to perform in a customary and usual manner or at all the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit, and, accordingly, the court erred in granting defendant's motion to direct the jury to return a verdict for the defendant, for the reason that the total and permanent disability contemplated by the total and permanent disability clause contained in the insurance policy in the case at bar does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform in a customary and usual manner all the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit.

III. Total disability which prevents an insured from engaging in any occupation or performing any work for compensation, within the meaning of the insurance policy in the case at bar, is such a disability as prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity; and since the evidence introduced by the plaintiff, taken as a whole, showed him to be prevented from working with reasonable continuity in his customary occupation, or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity, the court erred in direct-

ing the jury to return a verdict for the defendant.

IV. In a case such as the case at bar in which there was evidence of a capital investment and some management thereof by the insured, the test of the total disability of an insured is whether he would be able to procure and perform such employment in the open market, and is a question of fact for the jury to decide.

Pursuant to the aforesaid rule, the appellant hereby designates for printing the following parts and portions of the record forwarded to this court by the clerk of the United States District Court for the District of Arizona, to wit:

1. Attorneys of record.

2. The entire transcript of record on removal from the Superior Court of Maricopa County, State of Arizona, to the United States District Court for the District of Arizona, consisting of the following:

- (a) Plaintiff's complaint and the copy of the insurance policy attached thereto as Exhibit "A" (This copy of insurance policy may be either printed or incorporated in the printed record by means of a photostatic copy, whichever is most feasible.)

- (b) Summons.

- (c) Notice of application for removal.

- (d) Petition for removal of suit to the District Court of the United States for the District of Arizona.

- (e) Removal bond.

- (f) Order for removal of suit to the District Court of the United States for the District of Arizona.

(g) Minute entry of the Superior Court of Maricopa County, Arizona, ordering removal to the District Court of the United States for the District of Arizona, and fixing bond in the sum of \$500.00

(h) Certificate of Walter S. Wilson, Clerk of the Superior Court of Maricopa County, Arizona, certifying to the correctness of the transcript of record on removal.

3. Amended answer of defendant.

4. All minute entries, except the minute entry of Monday, June 14, 1948, which is the order setting the case for trial.

5. Verdict of the jury.

6. The final judgment as entered by the Clerk in the Civil Docket.

7. Plaintiff's motion for new trial. (The memorandum of points and authorities attached to the foregoing motion for new trial are not to be printed.)

8. Plaintiff's notice of appeal.

9. Plaintiff's bond on appeal.

10. Designation of record and proceedings to be contained in record on appeal.

11. The reporter's transcript of evidence in its entirety.

12. Stipulation for diminution of record.

13. Order to send up original exhibits.

14. The District Court Clerk's certificate to record on appeal.

15. Plaintiff's exhibits in evidence Nos. 1, 2, 3, 4, 5, 6 and 7.

The appellant does not request or require incor-

poration in the printed record of plaintiff's exhibits Nos. 8, 9 and 10, which are numerous x-ray film in large envelopes, or the cancelled checks contained in plaintiff's exhibit No. 11.

The appellant does not request or require the printing or incorporation in the printed record of any of the defendant's exhibits, all of which were marked for identification only, and none of which were introduced in evidence.

Dated at Phoenix, Arizona, this 8th day of March, 1949.

LANEY & LANEY.

By GRANT LANEY,

Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed March 10, 1949. Paul P. O'Brien, Clerk.